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ABSTRACT

The State Board of Education of Minnesota is preparing to adopt a metro-wide desegregation plan of a scope unique in the United States. The plan will require every school district in the seven-county metro area to desegregate the schools in Minneapolis and St. Paul, and it may require every school district in the state to reduce or close the racial learning gap for academic performance, dropout rates, rates of suspension and expulsion, and rates of participation in remedial and honors classes. Despite the good intentions that proposed these changes, these rules are likely to be disastrous for Minnesota. They will be very expensive, will vastly expand state control over local schools, and may make numbers juggling a top priority. By injecting racial factors into nearly every aspect of school life, they may sow discord instead of promoting harmony. There is no clear public policy route for improving the educational performance of poor minority children, as family socioeconomic status remains more influential than school strategies. Effective ways to help these children must be found. Answers may lie in better neighborhood schools, small scale studies of educational innovation, and the implementation of high standards and expectations. (SLD)

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Good Intentions Are Not Enough

The Peril Posed by Minnesota's New Desegregation Plan

Katherine A. Kersten

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GOOD INTENTIONS ARE NOT ENOUGH

The Peril Posed by Minnesota's New Desegregation Plan

Katherine A. Kersten

Center of the American Experiment
March 1995

EXECUTIVE SUMMARY

(I) The Danger

1. Minnesota's State Board of Education (SBE) is preparing to adopt a metro-wide "desegregation" plan of a scope unique in the nation. Though still in formation, the plan has two components:

• It will require every school district in the seven-county metro area (including those as far as New Prague and Forest Lake) to "desegregate" schools in Minneapolis and St. Paul.

• It may require every school district in the state to reduce or close the racial "learning gap" on four measures: academic performance, dropout rates, rates of suspension and expulsion, and rates of participation in remedial and honors classes.

2. Despite the good intentions that spawned them, the proposed rules are likely to prove disastrous for Minnesota.

• Around the country, costly programs designed to raise minority performance have done little to help poor minority children. In cities such as Kansas City, San Francisco, Detroit, Little Rock and Austin, Texas, racial gaps remain very wide, despite the expenditure of immense amounts on special compensatory programs.

• The SBE claims that the proposed rules will forestall a successful suit against the State of Minnesota and/or suburban districts. In fact, the rules will *create* grounds for such a suit and greatly *increase* plaintiffs' chances of success. The stakes are high. A judge recently ordered the State of Alabama to increase education spending by up to $1 billion a year in order to ensure every child a constitutionally mandated "adequate" education. The Minneapolis School District has retained a well-known plaintiffs' desegregation law firm to consider such an educational "adequacy" suit

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against the State of Minnesota. The State of Missouri has spent over $2 billion in the last 10 years on court-inspired "desegregation" plans.

• The proposed rules will vastly expand state control over local school operations. By making racial "numbers juggling" a top priority, they may create perverse incentives that encourage school officials to take actions that are not in the best interests of children. By injecting racial considerations into nearly every aspect of school life, the rules may undermine racial harmony rather than promote it.

3. It is no surprise that the proposed rules seem adverse to the State of Minnesota's interests.

• In its final report to the Legislature, the SBE's Desegregation Roundtable named "consultants" it had used to "fully address the legislative mandated issues." Among those listed were David Tatel, then of the Washington, DC law firm of Hogan & Hartson -- the very firm the Minneapolis School District has retained for purposes of its potential suit; and Gary Orfield, a nationally known advocate of race-based busing who often serves as an expert witness for plaintiffs in desegregation cases. Thus, plaintiffs who may sue the State of Minnesota may well bring suit under rules their own advocates helped to shape.

(II) Background

1. For years, Minnesota policy makers have assumed that racial balance in the schools is the key to improving minority performance.

• In 1973, in the wake of a suit against the Minneapolis School District, the SBE passed the "15-percent rule," which states that no school may have a minority enrollment more than 15 percentage points greater than the district-wide minority enrollment. [Minn. R. 3535.0200, subp. 4]

• Though Minneapolis and St. Paul have bused students for racial balance for over 20 years, they have little to show for it but large tax bills. Minority test scores have not appreciably improved -- indeed, black scores have declined sharply in Minneapolis in the last five years. And Minneapolis' own studies show that minority academic gains are only weakly related to racial balance in schools.

2. Demographic trends have brought the urban education crisis to a head.

• Since 1973, when mandatory busing began, Minneapolis' minority enrollment has grown from 17 percent to nearly 62 percent, and St. Paul's from 13 percent to about 52 percent. Both districts are having growing difficulty complying with the 15-percent rule. Disillusioned with busing, Minneapolis Mayor Sharon Sayles Belton -- like black mayors in St. Louis, Denver, Seattle and Cleveland -- wishes to return to neighborhood schools.

(III) The Proposed Rules

1. In 1993, the Minnesota Legislature appointed a Desegregation Roundtable to consider changing the 15-percent rule. The Roundtable proposed new rules that would institute a vast expansion of failed race-based busing to the entire seven-county Twin Cities metro area. The Roundtable gave two reasons:

• Minnesota has a legal obligation to ensure racial balance -- or "desegregation" -- in all metro area school districts. If the state does not pass such rules, a court will impose a more costly and coercive solution -- or so the Roundtable argued.

• Inter-district racial balance -- along with well-funded programs to close the racial learning gap -- will improve minority academic performance and enhance race relations (or, in current parlance, prepare students for a "globally diverse society").

2. In February 1994, the SBE *unanimously* endorsed the Roundtable's proposed rules. These rules had two parts:

• **Metro Desegregation.** The metro-wide desegregation rule defined as impermissibly "segregated" all metro districts with a minority enrollment greater than 31 percent or less than 10 percent. (The rule defined "segregation" in terms of metro-wide, rather than district-wide, minority enrollment.) The busing plan it required was portrayed as mandatory for school districts, but voluntary for families. Under the rule, minority students could transfer into overcrowded suburban districts closed for open-enrollment purposes. Schools that failed to achieve racial goals would face reduction of state aid.

• **The Learning Gap.** The rules also required all districts with more than 30 minority students to close the racial learning gap within four years. Currently, in Minneapolis, black students perform far below white students, and their scores are dropping. Black students drop out, and are suspended, much more frequently than white students. Yet schools which fail to reduce this gap would face "reconstitution" (i.e., a change of faculty and administration) and then state takeover.

3. In May 1994, after reviewing the rules, the Legislature granted the SBE enabling authority to adopt new desegregation rules.

• In February 1995, the SBE voted to proceed with discussion of a modified version of these rules. The 1995 rules would require metro school districts to achieve inter-district desegregation "to the greatest extent possible." Though the learning gap portion remains incomplete, the rules seem to favor a socioeconomic, rather than an exclusively racial definition of the gap.

(IV) Consequences

1. The State Board seems intent on spending vast sums to maximize metro-wide racial balance and to fund "learning gap" programs. Yet both research and long experience demonstrate that, though extremely costly, *neither race-based busing nor learning gap programs are likely to improve minority performance.*

• In the last 20 years, black students nationally have reduced the academic learning gap by half on reading and math, though progress seems to have stalled recently. Nevertheless, the gap remains large: In 1990, black 17-year-olds performed about 3.5 years behind whites in both reading and math. Research suggests that differentials are largely a function of socioeconomic factors beyond schools' control.

• Busing for "desegregation" purposes appears to have little, if any, reliable effect on minority achievement. A wealth of evidence supports this conclusion. Data from the National Assessment of Educational Progress, which has analyzed education trends since 1971, indicate that black students in predominantly black schools have done as well as their black peers in more racially balanced schools. A 1984 National Institute of Education literature review concluded that "desegregation" does not appreciably improve black performance. Wilmington, Delaware's schools have been almost perfectly racially balanced for 12 years, yet the racial gap there mirrors the national gap.

• Though some voluntary busing programs claim to improve minority performance, gains may well reflect self-selection by talented and motivated students.

• In San Francisco, a program intended to create "equity" in academic performance, discipline rates, and participation rates in special education classes has operated for 10 years at a cost of over $225 million. Though Gary Orfield helped develop this plan, in 1992 he found little progress: "huge gaps" remain, and "African American and Hispanic students still face devastating levels of educational failure," he reported. Large expenditures on "staff development" did not close the gap on measures such as discipline rates and special education assignment.

• In Kansas City, where a judge nearly doubled local property taxes to fund a $1 billion-plus magnet school program, a large racial gap persists. Orfield was involved in the Kansas City case, and recently pronounced himself "disappointed" with its "modest" results. In 1994, Orfield's Harvard Project on School Desegregation studied four large districts that attempted to "address segregation by pouring money into special programs for schools with large minority populations." The study concluded that, "there is no evidence whatsoever that the expensive programming and extra money" has improved minority performance.

• Both busing and learning gap programs often involve wasteful and inefficient expenditures of tax dollars. Inter-district busing programs require large sums for transportation and "incentives" (double payments) to suburban schools. In 1993, St. Louis spent $52 million for these purposes, including $2 million for taxis to chauffeur white students to city schools. In Milwaukee, both home and transfer districts are allowed to count transfer students in state aid calculations, significantly increasing the cost of educating these students.

2. Paradoxically, the proposed rules will greatly increase the chances of a successful suit against the State of Minnesota.

• The State Board claims that it has a legal duty to adopt a metro-wide "desegregation" plan. It insists that this duty arises from two sources: (1) *Brown v. Board of Education*, the 1954 cornerstone of desegregation law; and (2) the 1983 order dismissing the *Booker* case, in which a federal judge had found the Minneapolis School District illegally segregated.

• The State Board is wrong on both claims. Neither the State nor suburban school districts have a legal obligation to ensure racial balance between city and suburban schools. In fact, the new rules *create* such a duty.

• The State Board creates a duty to "desegregate" by radically altering the legal meaning of "segregation." Federal law does not prohibit racial "imbalance"; it prohibits racial imbalance caused by *intentional* government discrimination. However, the proposed rules define "segregation" as "intentional *or unintentional* separation" of students of different races "within a school district" or even "a school building" [emphasis added]. Thus, the rules render most metro school districts "segregated" by the stroke of a pen. Even "desegregated" schools may be labeled "segregated" if racial groups are not proportionally represented in all classes and activities ("resegregation").

• By requiring school districts to reduce or close the learning gap to the Commissioner of Education's satisfaction, the proposed rules create yet another enforceable legal obligation.

3. More specifically, these new legal requirements -- probably unique in the nation -- greatly increase potential plaintiffs' chances of success in the following ways:

• **In federal court.** The 1974 Supreme Court case of *Milliken v. Bradley* made comprehensive inter-district desegregation orders very difficult for plaintiffs to win. The new rules, however, will create grounds for a successful suit by removing the element of intent, and requiring metro districts: (a) to meet specific racial quotas (1994 version); or (b) to "desegregate" to the "greatest extent possible" (1995 version) -- a vague and essentially unattainable standard. Voluntary transfers alone are very unlikely to bring districts into compliance with these requirements. Minnesotans can expect a suit calling for mandatory busing to ensure compliance with the new rules.

• **In state court.** Currently, if plaintiffs sued the State of Minnesota in state court they would have to use new and relatively untested legal theories. But the proposed rules would ease plaintiffs' task. In a state court suit, plaintiffs will focus on the learning gap, seeking to prove either: (a) that it is a function of "segregation"; or (b) that it indicates that poor urban students do not receive a constitutionally mandated "adequate" education. In the first instance, plaintiffs would probably seek a metro-wide desegregation order, as well as state funds. In the second, they would probably seek money alone, claiming that poor urban students need much more money to achieve an "adequate" education.

• By making reduction of the gap a legal obligation (and by doing so whether the gap is caused by racial separation or socioeconomic factors), the new rules will lay the foundation for plaintiffs' case. Hogan & Hartson, the Minneapolis School District's attorneys, successfully made a claim of this kind in the recent Yonkers case, and is currently representing the Kansas City School Board against the State of Missouri in a similar claim.

• The Minneapolis School District is investigating an educational "adequacy" suit against the State of Minnesota. In such a suit, Minnesota's eventual new graduation rule will serve as a standard of what constitutes an "adequate education." Hogan & Hartson advises "education advocates" to "watch closely and attempt to influence the development of such standards . . . ."

• Even truly voluntary inter-district busing plans can increase the likelihood of litigation. In 1975, Wisconsin sought to address Milwaukee's growing minority enrollment by creating the Chapter 220 program, which permitted voluntary city-suburb transfers. Claims of discrimination grew out of this program, and Wisconsin settled the resulting suit. In 1994, the State spent nearly $100 million on an expanded Chapter 220 program.

• The proposed rules increase grounds for litigation against individual school districts, as well as the State. For example, they require local school boards to "maximize" desegregation when building new schools or remodeling existing ones. Such requirements -- along with requirements to move toward racial parity on discipline rates and special education assignment -- will render districts vulnerable to litigation on a host of new grounds.

4. By injecting racial considerations into many aspects of school life, the new rules will create perverse incentives, strip schools of local control and greatly expand state control.

• The racial gap appears to be caused largely by socioeconomic factors beyond the control of schools. Yet the new rules impose serious penalties on schools that fail to reduce or close the gap to the Commissioner's satisfaction. The 1994 rules require reconstitution for such schools after four years, and state takeover after seven, while the 1995 rules provide for reconstitution, and possibly loss of block grants. Such penalties may create perverse incentives for administrators to take actions that are not in children's best interests. Educators who wish to keep their jobs and their staffs may make their first priority juggling racial numbers to "look good."

• The learning gap rule may require schools to obtain state approval for plans covering nearly every aspect of school life. The rule's definition of "segregation" as "unintentional separation" of students and staff "in a school building" could conceivably be interpreted to require proportional racial representation on sports teams, in physics classes, in bands and orchestras, and in extracurricular activities like language clubs. Hogan & Hartson recommends that "segregated" schools give attention to racial representation on all these measures.

• Rules that require parity in discipline rates may lead administrators to subordinate student safety to racial considerations. Rules that require parity in honors and remedial courses may encourage administrators to drop "elitist" courses, or assign students to classes on the basis of race, rather than individual merit and need.

• To the extent the rules' requirements are phrased in terms of closing a gap, the cheapest and most reliable way to comply is by lowering the performance of high-achieving students. In San Francisco, high-achieving Chinese-American students have paid a price for administrators' struggle to achieve racial "equity."

• If busing remains truly voluntary -- yet suburban schools are required to close the gap -- they will hesitate to encourage urban minority transfers. By accepting students who tend to have higher dropout and discipline rates, they will simply be creating problems for themselves.

(V) Conclusion

1. There is no clear public policy route for adequately improving the educational performance of poor minority children, as families' socioeconomic status is consistently more influential than specific school strategies. However, we must work to find effective methods to help these children learn. Three promising methods include:

• First, neighborhood schools must be an option for parents of poor minority children, as such schools can provide stability, contribute to a sense of community, and make it easier for parents to become involved in their children's education.

• Second, Minnesotans should take full advantage of the innovative educational environment in this state. We should create "small educational laboratories" in which we can do "R &D" on what works best for poor minority children. We should also consider expanding school choice to include religious and other private schools.

• Third, in all we do, we must uphold high standards and expectations. We must focus on the content of the curriculum, ensuring that it is information-laden and well-grounded in basic skills.

2. In sum, Minnesota faces a financial crisis. Both our youngest and oldest groups will grow faster than the ability of the work force to support them. Minnesota cannot afford a costly, counterproductive program that will do little to assist the very children we seek to help.

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FOREWORD

You may have heard or read *something* about the school desegregation plan for the Twin Cities metropolitan area that has been winding its way through state government for the last few years. But then, again, perhaps you haven't.

Or even if you have heard a report here or there, chances are you haven't heard much about the plan's details. And almost surely, you haven't heard much about its implications. It's hard to imagine how such a potentially immense change in Minnesota education and finance could have provoked so little coverage and commentary by journalists, politicians, educators and others. But it has.

Let me be direct and not the least bit hyperbolic: The two new "rules" proposed by the Minnesota State Board of Education, in the good name of desegregation and better serving minority children, have no chance whatsoever of succeeding. Instead, they are jammed with potentially giant educational, social, legal and financial risks, as well as an unknowable number of perverse incentives and disincentives.

Here are two quick examples of the plan's inefficacy and danger, as explained by Katherine A. Kersten in this brilliant monograph.

The plan -- originated by the state-appointed, approximately 50-member "Desegregation Roundtable" -- "requires" school districts throughout Minnesota to quickly reduce or eliminate the "learning gap" between white and black children, under pain of state sanction. Unfortunately, I know of no major school district in the whole of the United States which has yet succeeded in doing this.

Sad fact is, we don't know how to equalize the educational performance of all groups as called for by the plan, as such differences have more to do with often radically different social and familial environments than with school policies. And most definitely, years of scholarly research provides no reason to believe that the kind of massive, supposedly voluntary busing called for by the plan would do the job, either.

That's an example of the plan's ineffectiveness. One of its severest dangers is that instead of reducing the possibility of courts stepping in to run Minnesota public schools (as billed), the plan does the exact opposite. By codifying impossible goals, it sets the stage for future plaintiffs to argue as so down a not-distant road:

"Look, the State of Minnesota *promised* that large-scale busing would lead to requisite percentages of minority and majority students in school districts throughout the metropolitan region; and the state *promised* that black kids and white kids throughout the state, in just a few years, would do equally well on standardized tests -- plus participate similarly in honors classes in physics, drop out of school at similar rates, and so on.

"But the State of Minnesota," future plaintiffs almost certainly will continue to argue, "has failed to meet this promise, and as a result, courts and judges must substitute themselves for local school boards." Make that "democratically elected" local school boards.

Starkly put, the SBE's two proposed metro-wide desegregation and learning gap rules pose the greatest existing legal, social and financial danger to Minnesota education. Fiscally, they can wind up costing taxpayers hundreds of millions of dollars annually.

In such frightening light, *Good Intentions Are Not Enough* is the most important document about public education in Minnesota in at least a decade, as it is the sole study challenging the plan's unacceptable means and untenable goals. Do I have a vested interest in claiming this, insofar as Ms. Kersten is my long-time colleague in American Experiment? Sure I do. But it's also true.

Kathy Kersten is vice chairman of Center of the American Experiment and a lawyer by training. She received her law degree from the University of Minnesota, her MBA from Yale, and her B.A., in philosophy, from Notre Dame. Rather than practicing law over the last several years, she has been a stay-at-home mom, and along with her husband, Mark Johnson (also an attorney) has been raising their four young children. She also has somehow managed to find the time to take on a wide array of civic activities -- and to write frequently.

She has asked that I note that she is not a trained "expert" in education, national desegregation policies and the like. Yes, that's true, in a narrow academic sense. But there is simply no one who better understands the profound, Minnesota-rooted questions at hand. This is an meticulously researched contribution, for which I am very grateful.

A final point, if I might, before explaining how to order additional copies.

Almost certainly, one of the main reasons why the SBE's plan has generated so little public criticism is the same reason why racial issues, more generally, are debated so poorly in this state and nation: Very few people relish opening up the morning paper and seeing themselves called nasty names, including racist. Will some folks spit such epithets at Ms. Kersten and American Experiment because of this monograph? No doubt. But at the risk of sounding inescapably defensive, let me say this:

My colleagues and I in the Center are as offended and terrified as anyone by the many failures of American education, especially as they hurt millions of minority children. But the overriding truth, as Ms. Kersten demonstrates, is that there is no reason to believe that the mammoth exercise in children moving and social engineering proposed by the State Board of Education could ever work. The evidence, in fact, is overwhelmingly in the opposite direction. Meaning that once again, poor children in particular will be disserved.

Copies of *Good Intentions Are Not Enough: The Peril Posed by Minnesota's New Desegregation Plan* are $10 for American Experiment members and $12.50 for nonmembers. Bulk discounts are available for schools, civic groups and other organizations. Please note our phone and address on the first page of the Executive Summary for membership and other information, including a listing of other Center publications and audio tapes.

Thanks very much and I welcome your comments.

Mitchell B. Pearlstein
President
March 1995

ACKNOWLEDGMENTS

I would like to thank those whose help has been indispensable on this project.

David Armor's visit to the Twin Cities in June 1994 first alerted many Minnesotans to the shortcomings of the "harm-benefit" thesis, and the failure of race-based busing as a vehicle for improving minority academic performance. David's great knowledge and broad experience are an asset to all who are interested in these important matters. His assistance in helping me grasp the "big picture" has been invaluable.

Abigail and Stephan Thernstrom's research has also been very useful.

I want to thank Barbara Thomson Bucha for her excellent research assistance, and Peter Zeller for his tireless technical help. Thanks, too, to the many people who read this very long text and provided thoughtful comments.

My husband, Mark Johnson has, as always, provided essential insight and support, and my children -- Will, Julia, Alex and Emma -- have been consistently patient with their mother as she strove to do four things at once.

I appreciate everyone's help, but I, of course, bear sole responsibility for the content of this monograph.

Katherine A. Kersten
March 1995

CHAPTER I
Introduction

(1) The harm-benefit thesis

Minnesotans have sadly grown accustomed to headlines announcing the gap between the academic performance and social well-being of our state's white and minority children, especially the urban poor. This has been so since at least the early 1970's, when the Twin Cities first began to grapple seriously with problems of race and education. Yet far from being confined to Minnesota, the racial gap is a national problem.

For years, Minnesota policy makers have assumed that the best way to improve minority students' academic performance is to pour resources into busing them across town, so that they can learn next to white children in a "racially balanced" environment. The social science theory underlying this view is called the "harm-benefit thesis." Influential since the 1954 Supreme Court case of *Brown v. Board of Education*, the harm-benefit thesis holds that education in predominantly minority schools harms the academic, social and psychological development of minority children. Conversely, education in the company of white children is thought to benefit minority children in many important ways.

In 1973, the Minnesota State Board of Education adopted a racial balance requirement, known as the "15-percent rule." This rule -- still in effect -- prohibited the operation of schools having minority enrollments more than 15 percentage points higher than the district-wide average of minority students at grade levels served by those schools. The rule led to extensive race-based busing in Minneapolis and St. Paul, which were the only metropolitan districts affected, given demographic conditions at the time.[1] Simultaneously, the Minneapolis and St. Paul School Districts instituted other policies consistent with the harm-benefit thesis. These included a sustained effort to recruit more minority teachers, and the adoption of "multicultural" curricula highlighting (among other things) perceived differences in racial perspectives.

Policies grounded in the harm-benefit thesis have been very costly, both in terms of taxpayers' dollars and the cohesion of inner-city neighborhoods. But for years, Minnesotans of all races have been assured that their cost was justified. Racially balanced schools, we were told, would bring improvements in both minority academic performance and race relations.

After a 20-year trial, however, it is clear that policies inspired by the harm-benefit thesis have failed to achieve their objectives. Black students are not doing significantly better on standardized tests than they were when busing started; indeed, their test scores have fallen in the last few years, at least in Minneapolis. Moreover, recent data suggest that the academic progress of black students in Minneapolis is only weakly related to the racial composition of the schools they attend.[2]

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[1]In 1972, a federal judge also imposed a desegregation order on the Minneapolis School District. The case of *Booker v. Special School District No. 1* is discussed later in this paper.

[2]Though there is a slightly negative correlation of black achievement gains in reading with the concentration of black students in the school, there are also trend "outliers." These are schools with high concentrations of black students in which black students exhibit relatively large gains, and schools with low concentrations of black students in which black students exhibit relatively low gains. Likewise, as the proportion of low-socioeconomic students in a school increases, there is a slightly negative correlation with achievement gains by low SES students. However, there are also significant outliers; i.e., schools with a high concentration of low SES students where such students are making relatively high gains, and schools with a low concentration of low SES students where such students are making relatively low gains. Conversation with William Brown, Minneapolis Public Schools Office of Research, Evaluation and Assessment, March 6, 1995.

Far from helping minority youngsters, race-based busing may actually have harmed many of them. The policy contributed to "white flight," and greatly increased parents' difficulties in becoming involved in their children's schools. Equally significantly, race-based busing contributed to the breakdown of community institutions that could otherwise have provided vital stability in poor children's lives.

Just as it has failed to raise test scores appreciably, busing seems to have done little to improve race relations in the Minneapolis and St. Paul schools. In fact, a study of St. Paul schools conducted in 1994 by People for the American Way suggests that race relations may actually be worsening there.[3] After two decades of busing and multicultural curricula, various officials and constituencies in both districts believe that their schools remain permeated by "embedded" or "systemic" racism.[4] Nevertheless, many busing advocates continue to tout race-based busing as a surefire way to improve race relations, or in current parlance, to enhance children's appreciation of "cultural" or "global diversity."

Acknowledging busing's failure to live up to its promise, in November 1994 the Minneapolis School District announced that it was considering a plan to return to neighborhood schools. Some members of the district's School Board now believe that stability and parental involvement are more important educational assets for poor minority children than racial balance in the schools. Calling for a rebuilding of inner city communities, Mayor Sharon Sayles Belton recently added her support to the neighborhood school proposal.

Disappointing experiences like Minneapolis' and St. Paul's are leading a growing number of social scientists to rethink the harm-benefit thesis itself -- and the assumptions underlying it -- and to seek more effective ways to boost minority achievement. Unfortunately, however, in grappling with the urban education crisis in Minnesota, our State Board of Education has not engaged in innovative (and common-sense) thinking of this kind.

(2) The rules

In 1993, the Minnesota Legislature directed the SBE to appoint a "Desegregation Roundtable." The approximately 50-member Roundtable was to review the state's "desegregation and inclusive education rules," and to recommend ways to improve them. The Roundtable drafted new rules, which about 30 of the metro area's school superintendents endorsed.[5] In February 1994, the SBE unanimously endorsed these rules and sent them to the Legislature requesting authority to promulgate them.

Apparently, however, neither the Desegregation Roundtable nor the SBE began their task by asking, "How can we use our resources to provide the best possible opportunity for poor minority children to learn?" Rather, both seemed determined from the outset to make racial balance the centerpiece of their efforts, and to find a way to expand policies that had failed in Minneapolis and St. Paul to the entire seven-county metro area.

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[3]Wayne Washington, "A Poor Grade on Tolerance," *Star Tribune*, November 23, 1994.

[4]Laurie Blake, "Search Is On for Embedded Racism," *Star Tribune*, December 5, 1994 (regarding Minneapolis), and The Blue Ribbon Commission on Diversity and Equity, "Report to the Superintendent of the St. Paul Public Schools" (St. Paul Public Schools, May 4, 1994). See also Superintendent Curman Gaines' response. Curman L. Gaines, *Superintendent's Response to the Blue Ribbon Commission on Diversity and Equity* (St. Paul Public Schools, June 21, 1994). Gaines states "[W]e firmly believe the vast majority of our staff remain strongly committed to helping all students succeed." *Superintendent's Response*, 1. He recommends that the schools "integrate curriculum and student/staff training to eliminate prejudice in our schools." Ibid., 14.

[5]Debra O'Connor, "Schools Give Nod to Integration Plan But Clutch Wallets," *Pioneer Press*, March 9, 1994.

In the form unanimously endorsed by the SBE in February 1994, the draft rules addressed two subjects: "desegregation/integration" and closing the racial learning gap. The "desegregation/integration" rule would transform busing-based "desegregation" from a district to a metro-wide responsibility. It would assign mandatory racial quotas -- racial ceilings and floors -- to all school districts in the seven-county metro area. These districts, and the State, would assume legal responsibility for "desegregating" inner-city schools. Districts that failed to meet their racial quotas would face possible reduction of state aids.

The learning gap rule would require the approximately 170 Minnesota school districts that have more than 30 minority students to "close the learning gap" between racial groups. Schools that did not achieve parity between white and minority students on four measures on which racial groups often differ significantly -- academic achievement, dropout rates, suspension and expulsion rates, and rates of participation in honors and remedial classes -- would face the possibility of "reconstitution," or a complete change of faculty, within four years, and loss of autonomy to state control within seven years.

In May 1994, the Legislature gave the SBE broad enabling authority to proceed with promulgation of new rules. On February 13, 1995, the Minnesota Department of Education's new Office of Desegregation/Integration -- established by the 1994 Legislature -- submitted a modified version of the draft rules for the SBE's consideration.[6]

The February 1995 rules, like those the SBE unanimously endorsed in 1994, define as "segregated" all metro-area school districts that have over 31 percent, or under 10 percent, minority students.[7] Minneapolis and St. Paul fall into this segregated category, as do approximately 39 of the 48 or so metro-area suburban school districts. The rules would require segregated districts to prepare a "racial balance" plan with "district goals and strategies for achieving them that assures [sic] that the district will eliminate segregation to the greatest extent possible." They would also require both desegregated and segregated suburban districts (including such far-flung districts as Hastings, Belle Plaine, New Prague and Jordan) to address "how they will reduce the disparities in the racial composition of the learners of their district[s] and the racially isolated districts," i.e., Minneapolis and St. Paul.

Like the 1994 rules, the new rules would permit minority students from Minneapolis and St. Paul to transfer at any time to a "segregated" suburban district, even if that district were closed for open enrollment purposes because of crowding. (The suburban district would be required to cover transfer students' transportation costs.)[8] The rules would reaffirm the 15-percent rule's racial balance requirement, though they would permit districts an opportunity to justify "exceptions" to "efforts to eliminate segregation" at particular school sites.[9] Like the 1994 rules, the new rules would require that all new construction or remodeling of schools in metro districts "give maximum effect to requirements of eliminating and preventing racial as well as socioeconomic

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[6]"Revised Recommendations from the Roundtable Discussion Group (Rules Relating to Equality of Educational Opportunity, and School Desegregation/Integration)," February 13, 1995.

[7]Specifically, the rules define a segregated district as a metro-area district that has "a district-wide average that is 15 percent or more over the metro-wide learners of color percentage," or "has less than 10 percent learners of color in the district. . . ." When the SBE passed the 1994 version of the rules, the "metro-wide learners of color" percentage was 16 percent.

[8]Revised Recommendations from the Roundtable Discussion Group, 15.

[9]According to Robert Miller, director of the Office of Desegregation/Integration, districts could meet their desegregation obligations in a number of ways: through establishment of state magnet schools, through inter- and intra-district racial balance plans, and through boundary changes. Neighborhood schools would be possible for a district like Minneapolis if the district could justify its need for an exception to "efforts to eliminate segregation at [a] school site." Conversation with Robert Miller, February 14, 1995.

segregation."[10] Like the 1994 rules, they would provide that districts that failed to meet racial balance goals could face a reduction of state aids.

The 1995 rules did not attempt to define the learning gap. Nor did they specify the degree to which districts must close the gap, or set forth all the circumstances under which penalties for failure to close the gap may be imposed. The SBE requested Robert Miller, director of the Office of Desegregation/Integration, to flesh out these details at its March 1995 meeting.[11]

Yet the 1995 rules did contain some provisions concerning the learning gap. More than the 1994 rules, they focused on mechanisms for targeting and assisting low-achieving children. The new rules would require all districts in Minnesota to devise a "Community Learning Plan" that would specify criteria to be used in identifying students who should receive "compensatory learning revenues." Community Learning Plans would also set forth instructional methods, professional development strategies, as well as local, state and federal resources to be used in closing the gap. Reconstitution would remain a penalty for districts that failed to reduce the gap "after a three year period." In fact, the new rules provide that, "the local board of education shall have the authority to reconstitute a school site irrespective of bargaining agreements."

(3) The consequences

The final form of the rules the SBE will adopt is still unclear.[12] To date, the SBE's most significant action remains its unanimous approval of the 1994 rules, which it forwarded to the Legislature with a "strong" endorsement. But whether the SBE's final rules more closely resemble the 1994 or the 1995 rules, four consequences are likely to follow.

• First, Minnesota will take another giant step away from the colorblind society envisioned by *Brown v. Board of Education* and Dr. Martin Luther King, who advocated judging human beings by the content of their character, not the color of their skin. The SBE's new rules are likely to inject racial considerations into the center of education policy-making on nearly every issue -- from discipline standards, to honors classes, to the location of new schools in Washington and Scott counties.

• Second, the new rules will radically alter the legal landscape in Minnesota. They will greatly increase the chances of a successful suit against the State of Minnesota. At stake down the road -- as the experience of other states makes clear -- is hundreds of millions, perhaps even billions of dollars, of taxpayers' money.

The field of desegregation law is fast-changing, complex, and well-understood only by a handful of specialists. Even seemingly innocuous rule language or platitudinous policy statements may be of momentous importance in tipping the balance in favor of judicial overreach in future litigation. Indeed, state agencies' policy statements may be the most difficult evidence for state defendants to rebut in desegregation suits.[13]

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[10]Actually, this rule is already on the books, though currently it only requires the Commissioner of Education and local boards to take intra-district racial balance into account. In the context of the new rules, it would require that schools be remodeled or built only if they served to improve racial balance on a metro-wide scale.

[11]Conversation with Robert Miller, February 14, 1994.

[12]The SBE has issued a "Notice of Intent to Solicit Outside Information Regarding Proposed Rule Governing Desegregation/Integration." Issues the Board may consider include, but are not limited to: "defining segregated districts and sites; the responsibility of districts to develop plans that address closing the learning gap, diversity, and racial balance; and compliance issues."

[13]The State of Connecticut has faced this situation in the ongoing case of *Sheff v. O'Neill* , which may serve in some ways as a model for an eventual suit against the State of Minnesota. State education agencies' policy

Yet the SBE seems to have little sense of the legal minefield it has entered. In fact, the Desegregation Roundtable's Final Report to the Legislature states that among the "consultants" used to "fully address the legislative mandated issues" was David Tatel of Hogan & Hartson -- a Washington, DC law firm specializing in suing states on behalf of school districts in desegregation cases. In December 1994, the Minneapolis School District formally retained Hogan & Hartson to investigate a suit against the State of Minnesota.[14] Unfortunately, the Roundtable does not appear to have retained the service of an expert charged with protecting the State's interests.

In addition to putting the State of Minnesota in legal peril, the rules will create new grounds for suits against individual school districts. For example, both the 1994 and 1995 rules require metro-area school boards to approve only school construction and remodeling plans that "give maximum effect to requirements of eliminating and preventing racial as well as socioeconomic segregation." Likewise, the rules prohibit the Commissioner of Education from approving any construction or remodeling plans that "perpetuate racial and socioeconomic segregation." Both the Commissioner and individual school boards will find it hard to prove that they have fully complied with vague and open-ended language of this kind, which does not even require that approval be "reasonable," or that a variety of policy considerations be balanced in decisions about school construction. (After all, no matter what action a school board in Stillwater or Waconia takes, it could conceivably do more to "maximize" desegregation with Minneapolis or St. Paul.) Thus, a requirement of this kind could invite costly litigation every time a new wing is added to a school in Chaska or Forest Lake.

• Third, the new rules are likely to create a perverse tangle of incentives and disincentives that frustrate the intentions of their drafters. Even rule advocates believe that promoting metro-wide racial balance will be easiest if suburban districts cooperate voluntarily. Yet if the SBE's new rules stress *voluntary* measures for achieving inter-district racial balance (as they do), but *penalize* suburban districts that fail to close the racial gap in test scores or dropout and suspension rates, districts will hesitate to encourage significant numbers of minority transfers, as doing so would likely invite compliance problems.

• Fourth and finally, the new rules will facilitate a vast expansion of state power over many aspects of school life in Minnesota. Many -- perhaps all -- districts will have to obtain state approval for multifaceted learning-gap reduction plans and goals. They may have to account to state officials for matters as disparate as the number of Hispanic students in physics classes and the number of black students suspended. Moreover, all metro districts (regardless of the racial composition of their own population) will have to win the state's seal of approval for the racial composition of their schools. By the stroke of a pen, the SBE may place nearly every district in Minnesota out of compliance with the law on some measure.

(4) The SBE's burden of proof

If the SBE plans to adopt sweeping desegregation rules such as these, it bears a heavy burden of proof. The Board must demonstrate to Minnesota parents and taxpayers that -- though the new rules have a price -- they will accomplish two important objectives: Raising minority achievement and improving race relations.

As already noted, busing has generally failed on both these counts in Minneapolis and St. Paul. But the failure of busing is a nationwide phenomenon.[15] Data from the National Assessment of

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statements also proved extremely important in Hogan & Hartson's suit against the State of New York on behalf of the Yonkers Board of Education in the recent *Yonkers* case. Both cases are discussed later in this paper.

[14]Tatel is no longer with the firm, having recently been appointed to the federal bench.

[15]The extensive literature casting doubt on claims that busing improves minority achievement is summarized later

Educational Progress, which has evaluated reading and math performance for almost 25 years, indicate that busing has little, if anything, to do with minority achievement. For example, the NAEP data for 1975 to 1988 (when black students made significant academic progress) show black students in majority black schools making gains as large or larger than those of blacks in majority white schools.

There is little evidence that busing reliably improves race relations. Just as often, it seems to have the opposite effect.[16] Likewise, a growing body of research suggests that costly remedial programs may do little to improve minority academic performance. Thirteen years ago, San Francisco implemented a desegregation plan with learning gap components much like those now proposed in Minnesota. The plan -- designed in part by Gary Orfield, who advised the Desegregation Roundtable -- was recently declared by Orfield himself to have failed grievously in most respects.[17] Before the SBE imposes such a plan on Minnesota schools, its members have an obligation to review the July 1992 report in which Orfield documents the failures of the San Francisco plan.

Unfortunately, however, neither the SBE, nor many other rule advocates, appear to have carefully reviewed the research on busing, remedial programs, race relations and minority achievement. In fact, at a Minnesota Senate Education Committee hearing which I attended in March 1994, some participants seemed to adopt an almost cavalier attitude toward the question of whether busing really "works."

At the hearing, several senators asked for evidence that a metro-wide busing plan would actually improve minority academic performance. Rule advocates generally seemed surprised at this question. Neither individuals testifying in favor of the proposed rules, nor their allies in the Senate seemed able to cite such evidence. One senator commented that he thought that everyone knew that busing for racial balance was good for kids. Perhaps, in his mind, rule drafters' good intentions were sufficient grounds for approval.

(5) The fiscal crisis

But good intentions are not sufficient. Minnesota is facing a crisis in minority academic performance, but it is also facing a fiscal crisis. Under current conditions, the state cannot afford to embrace a costly "desegregation" plan whose chances of success are dubious.

On January 10, 1995, Gov. Arne Carlson released a Minnesota Planning Department Report that outlines the magnitude of the coming fiscal crisis.[18] According to the report, over the next decade the number of students and senior citizens -- the two age groups that require the greatest government help -- will grow significantly, outstripping the ability of the state's work force to support them at current levels. As a result, both local governments and the state will face recurring budget deficits between 1999 and 2005, regardless of the health of the state's economy.

Over the next six years, enrollment in Minnesota schools will grow by 50,000 students, an increase of six percent over current figures. Education is already the most expensive item in the state budget, accounting for 30 percent of all state spending, and about half of each homeowner's

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in this paper.

[16]The research on "desegregation's" effect on race relations will be examined later in this paper.

[17]Gary Orfield, "Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation," Submitted to Judge William Orrick, U.S. District Court, San Francisco, California, July 1992. David Tatel was also on the court-appointed committee that produced this report.

[18]"Within Our Means: Tough Choices for Government Spending," described in Dennis J. McGrath, "Dark Financial Clouds: State Report Sees Tough Choices for Cutting Government Spending," *Star Tribune*, January 11, 1995.

property tax bill.[19] Over the next 10 years, the number of Minnesotans over 65 will grow by 9 percent, to 618,000. Health care costs are likely to rise correspondingly. Simultaneously, however, growth in the labor force and in personal income will slow. Thus, governments will find it impossible to tax their way out of budget deficits. The result, the report declares, will be deficits averaging $625 million for state and local governments (combined) in each of the next four biennia.

The desegregation rules now before the SBE are sometimes touted as "new" in spirit, even as "revolutionary." Indeed, if adopted, they will give rise to a scheme whose scope is -- in many ways -- unprecedented in the nation. Yet in another sense, these rules are anachronistic. For they are inspired by old and increasingly discredited ways of thinking.

Minnesotans must call for a fresh approach to our urban education crisis, which grows perpetually more serious. A new plan should draw on the experience and insights gained over the last two decades, both in the Twin Cities and elsewhere around the country. At the very least, we must insist that the State has the benefit of advice from legal and social science experts who can explain the long-term consequences of the SBE's course, and suggest superior alternatives.

Sadly, the proposed rules -- so prescriptive and so costly -- may just create a comforting illusion that we are "doing something" about the urban education crisis. Most likely, they will make policy makers feel good: "Now, no one can say we don't care." Ironically, however, if these rules are adopted, among the biggest losers may be the poor minority children we aim to help, who will have lost yet another chance at an improved education.

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[19]Ibid.

CHAPTER II
The Rules

Minnesota has had rules relating to desegregation and equal opportunity since 1970. The SBE's new rules would replace these rules.

Known as the "15-percent rule," the current desegregation rule prohibits Minnesota school districts from operating schools having minority enrollments more than 15 percentage points higher than the district-wide average of minority students at grade levels served by those schools.[1] In effect, the rule imposes a rolling racial ceiling. For example, if minority students currently make up 61 percent of all Minneapolis first graders, no Minneapolis elementary school may have more than 76 percent minority first graders. Currently, only three districts -- Minneapolis, St. Paul and Duluth -- have minority populations large enough to bring them within the purview of the 15-percent rule. However, a number of districts, such as Robbinsdale, Brooklyn Center, Osseo and Bloomington, are close to exceeding the rules racial ceiling.[2]

The SBE's proposed learning gap rule would replace a rule currently on the books, Minn. R. 3535.0200, subp. 2, which concerns "equal educational opportunity." This existing rule defines equal opportunity in color-blind terms, as "the provision of educational processes where each child of school age residing within a school district has equal access to the educational programs of the district essential to his needs and abilities regardless of racial or socioeconomic background." The SBE's proposed "learning gap" rule also concerns "equal educational opportunity," but redefines that term to mean "equal educational outcomes" across racial groups.

Why does Minnesota have "desegregation" rules? To make sense of the evolution of the SBE's proposed rules, it is necessary to understand the history of Minn. R. 3535.

(1) History

At the November 14, 1994 meeting of the SBE Desegregation/Integration and Inclusive Education Committee, Lyle Baker of the Minneapolis School District summed up the driving force behind calls for metro-wide busing in one sentence: "Minneapolis has gone from 17 percent minority students in 1972 to 62 percent in 1994."

In 1963, minority student enrollment in Minneapolis stood at 6.6 percent. In St. Paul the figure was 9 percent. In both cities, minority students were clustered in a few schools. Minneapolis initiated voluntary busing for desegregation purposes in 1967, and St. Paul followed the next year.[3] In 1967, the SBE passed guidelines stating that racial imbalance occurred when the minority enrollment exceeded 20 percent in elementary schools, or 10 percent in secondary schools.

In 1971, in what became known as the *Booker* case, the guardians of three black students brought

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[1]Minn. R. 3535.0200, subp. 4 states that, "Segregation occurs in a public school district when the minority composition of the pupils in any school building exceeds the minority racial composition of the student population of the entire district, for the grade levels served by that school, by more than 15 percent."

[2]Christopher Burns, "State Will Offer Money for Magnets," *Sun-Current* (Edina), November 23, 1994. This article quotes Robert Wedl, assistant commissioner at the Minnesota Department of Education.

[3]A group of parents had initiated voluntary busing in St. Paul in 1964. The St. Paul District assumed responsibility for busing the children in 1968.

a federal class-action suit against the Minneapolis School District.[4] Plaintiffs charged the Minneapolis School Board with intentionally discriminating against black students. Judge Earl Larson ruled in favor of the plaintiffs, and ordered the Minneapolis district to implement a desegregation plan. The district did not appeal. A similar suit against the St. Paul school district was dropped in 1970 when the district, under Superintendent George Young, voluntarily agreed to impose a racial busing plan.

In 1973, the State Board adopted the 15-percent desegregation rule that remains in effect today. The next year, large-scale, race-based busing began in Minneapolis, with 12,000 students being bused out of their neighborhoods to promote racial balance.[5] Minneapolis district officials also initiated other race-conscious remedies in hopes of achieving substantial improvement in both minority achievement and race relations. These included teacher and student exchanges, staff and student "sensitivity training," and multicultural curricula.

Over the course of the court order, Judge Larson raised the allowable ceiling on minority students from 35 percent initially, to 50 percent in 1981. In 1983, when minority enrollment in Minneapolis had more than doubled to 35 percent, Judge Larson freed the Minneapolis Public Schools from court order, determining that the district had complied with the requirements of his original order.[6] Nevertheless, mandatory busing continued in Minneapolis, as required by the state's 15-percent rule.

The lifting of the court order did not halt the precipitous decline in the number of white students available for "racial balance" purposes. In 1971, the Minneapolis school district had 14.5 percent minority students. In 1980, the figure was 31 percent; in 1985, 40 percent; and in 1989, 50 percent.[7] Today, the Minneapolis schools are over 61 percent minority;[8] the minority enrollment in St. Paul schools is approximately 52 percent.[9] Forced busing has contributed to white flight and resegregation in Minneapolis and St. Paul, as it has in urban areas all over the country. Making matters worse, white families' departure for the suburbs coincided with a steep rise in out-of-wedlock births among city residents, and a rise in welfare dependency, crime and drug abuse. White flight thus exacerbated the concentration of poverty in the central cities, as well as the social pathologies that often accompany it.

Unfortunately, Minneapolis and St. Paul appear to have little to show for 20 years of costly busing for racial balance. In Minneapolis, minority students continue to perform 20 points below white students on standardized achievement tests.[10] . In 1994, St. Paul's Blue Ribbon Commission on Diversity and Equity issued a report decrying the substantial racial learning gap in that city's schools.[11] In both Minneapolis and St. Paul, a large racial gap persists in dropout rates, rates of suspension and expulsion, and rates of participation in remedial and honors classes. Although

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[4]*Booker et al v. Special School District No. 1*, No. 4-71 Civ. 382 (D. Minn. May 24, 1972) (*findings of fact, conclusions of law, and order for judgment*).

[5]Council of Metropolitan Area Leagues of Women Voters, *Metropolitan School Desegregation and Integration: A Study of Proposals for Integrating Schools of the Metropolitan Twin Cities Area of Minnesota*, St. Paul, MN: January 1991, 11.

[6]*Booker et al .v. Special School District No. 1*, No. 4-71 Civ. 382 (D.Minn. June 8, 1983) (memorandum order).

[7]Council of Metropolitan Area Leagues of Women Voters, 12.

[8]Laurie Blake, "New Racial Study Fuels Desegregation Debate," *Star Tribune*, January 7, 1995.

[9]St. Paul Public Schools Racial Balance Report (November 1994), 3.

[10]Laurie Blake, "Most Minneapolis Grade Schools Lagging," *Star Tribune*, November 16, 1994. Minnesota students take the California Achievement Test for reading and math. On a normal curve equivalent of 100, the test's mean is 50 and the standard deviation is 20. Thus, black students perform about one standard deviation below white students.

[11]The Blue Ribbon Commission on Diversity and Equity, *Report to the Superintendent of the Saint Paul Public Schools*, May 4, 1994.

forced busing produced greater racial mixing in earlier years, the process of "resegregation" is now advanced in both cities.

(2) The metro-wide solution

Today, many school officials in Minneapolis and St. Paul claim that they can no longer comply with the state's 15-percent rule unless the SBE passes a rule requiring predominantly white suburban school districts to "desegregate" city schools.[12]

Talk of metro-wide desegregation is not new. It began seriously in 1989, when the Minnesota Department of Education initiated a series of meetings to consider the subject.[13] The process was characterized as open and objective. From the beginning, however, it was dominated by individuals and interest groups whose worldview was shaped by the harm-benefit thesis, and who saw metro-wide race-based busing as the primary answer to urban education problems, despite the desperate condition of many "desegregated" inner-city schools. Rather than reviewing the voluminous literature on factors that affect minority student achievement, these individuals started with the assumption that race-based busing must be at the center of their efforts.

A 1991 League of Women Voters report, entitled "Metropolitan School Desegregation and Integration," reveals the one-sided nature of the discussions regarding metro-wide desegregation. The report describes a Metropolitan School Boards Academy seminar on the subject sponsored by the Minnesota Department of Education's Equal Educational Opportunities section on February 11, 1989. The seminar "was intended to tell key school people what was happening in the metropolitan area and to show what needed to be done." At the seminar, "national speakers" addressed "recent desegregation court cases, demographics, the benefits of desegregation, the importance of proactive planning, and different approaches to metropolitan desegregation." Among the speakers was Gary Orfield, later a consultant to the SBE's Desegregation Roundtable. According the League of Women Voters' report, "All the speakers encouraged the people there to begin the process of interdistrict metropolitan desegregation."[14]

Particularly influential in the planning process for metro-wide desegregation was David Tatel, at that time a partner in the Washington, DC law firm of Hogan & Hartson. Hogan & Hartson is nationally known as plaintiffs' attorneys in school desegregation cases; the Minneapolis School Board retained the firm in December 1994 to investigate a suit against the State of Minnesota.[15] In a speech to a Metropolitan School Boards Academy meeting on September 27, 1990, Tatel set forth his views concerning how the Twin Cities should attack the problems of poor minority students in the central cities.

Tatel's remarks relied heavily on the harm-benefit thesis. He suggested that urban minority

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[12]The problem is particularly acute in Minneapolis, where in January 1995, nine schools had 80 to 85 percent minority students. The Department of Education is not taking action against Minneapolis because it recognizes that the district can no longer meet the 15-percent rule's requirement with students within its own boundaries. Laurie Blake, "New Racial Study Fuels Desegregation Debate," *Star Tribune*, January 7, 1995. Of course, if the SBE changed or removed the rule's racial ceiling, compliance would not be a problem.

[13]Earlier, in 1987, St. Paul Superintendent David Bennett began devising a plan for metropolitan desegregation. According to the report of the Council of Metropolitan Area Leagues of Women Voters, Bennett "also invited David Tatel, a desegregation cost specialist, to speak to the Legislature concerning the state's obligation to pay metropolitan desegregation costs. These were among the factors that convinced the Legislature that the state needed to share the financial burden of desegregation costs." Council of Metropolitan Area Leagues of Women Voters, 14.

[14]Council of Metropolitan Area Leagues of Women Voters, 14.

[15]Kevin Duchschere, "Minneapolis Schools Won't Require Employee Residency," *Star Tribune*, December 12, 1994.

students' academic problems are, to a significant extent, a result of the racial mix in Minneapolis schools. According to the League of Women Voters report, he urged education officials to view these students' shortcomings as "education deficiencies related to racial isolation in segregated schools."[16] He suggested that officials "look carefully at the *Milliken II* decision[17] . . . and make sure there is enough money" for dealing with education deficiencies resulting from "segregated schools."[18] Significantly, Tatel urged his listeners to "look seriously at metro-wide desegregation, first voluntary, ***then mandatory***, with technical assistance and funding to help local school districts accomplish desegregation [italics added]."[19]

Rather than basing their advocacy of metro-wide busing on a careful review of the research literature, participants in the process tended to defend their position with vague, if well-intentioned rhetoric about preparing students of all races for a "multicultural future." They did not seem troubled by the fact that rhetoric of this kind had earlier been used to justify racial busing in Minneapolis and St. Paul, with disappointing results. The Minnesota Desegregation Forum's "Report to the Minnesota State Board of Education," dated November 1990, contained a typical exhortation:

> Segregated education, *de facto* or *de jure*, is inferior preparation for students who live or who will live in a culturally diverse world. . . . Minnesota schools must be committed to learning environments and curricula which overcome racial, ethnic, and socioeconomic biases and which value diversity.[20]

Those who supervised these early and important discussions of metro-wide desegregation proposed expanding a costly and disruptive policy, without ever seriously addressing the reasons that race-based busing had failed to achieve its objectives after a 15-year trial in Minneapolis and St. Paul. Through all discussions concerning metro-wide desegregation, it appears that no expert -- either attorney or social scientist -- was invited to present a perspective that differed significantly from that of metro-wide desegregation advocates.

(3) Setting the stage for the rules

Nevertheless, for several years, talk of metro-wide desegregation remained largely talk. Responding to demographic realities, the SBE took preliminary steps in 1992 to remove the 15-percent ceiling from Minn. R. 3535, so that schools with growing minority enrollments could operate without fear of violating the rule's racial ceiling. But the SBE backed down after concerns about litigation arose.

In 1993, a jittery Legislature directed the SBE to convene a Desegregation Roundtable of approximately 50 members to consider the dilemma at hand.[21] Though often portrayed as an objective and deliberative body, the Roundtable was dominated -- as earlier groups had been -- by individuals ardently committed to metro-wide busing.

The Legislature directed the Roundtable to "utilize nationally known legal and research experts to

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[16]Council of Metropolitan Area Leagues of Women Voters, 35.

[17]Ibid. The report described *Milliken II* as the case "which serves as a blueprint for desegregation remedies: the case also found states responsible for part of desegregation costs."

[18]Ibid.

[19]Ibid.

[20]Ibid.

[21]The Roundtable's official name was the "Roundtable Discussion Group on Desegregation/Integration and Inclusive Education."

the extent possible to assist in the discussions."[22] According to the Roundtable's final report, dated February 1994, "Consultants were employed as determined by the Roundtable participants to fully address the legislative mandated issues."[23] However, the Roundtable's only prominent social science consultant was Dr. Gary Orfield of the Harvard Project on School Desegregation, brother of Rep. Myron Orfield, and nationally known as a strong advocate of busing and a plaintiffs' expert in school desegregation cases.[24]

On legal issues, the Roundtable's approach was equally skewed. As already noted, David Tatel of Hogan & Hartson spoke to the group.[25] The Roundtable also heard from attorney Larry Leventhal, who had submitted an *amicus curiae* brief in the *Booker* case on behalf of Little Earth of United Tribes, the Minneapolis Public Schools Indian Parent Committee, and the Indian Health Board.[26]

In effect, the Roundtable sought imput on the rules from an attorney associated with a firm that is now considering a suit against the State of Minnesota. Apparently, however, the Roundtable did not seek advice from an attorney who represented the State's interests, or warned of the rules' potentially grave legal consequences for suburban and rural school districts. Because of this less-than-balanced approach, the SBE unanimously endorsed the Roundtable's report and draft rules on February 8, 1994 without the opportunity to hear from experts who could have pointed out their flaws, or provided access to the full spectrum of research on busing and minority achievement. Under the circumstances, the SBE was not able to make what many would consider a truly informed decision.

In May 1994, the Legislature passed enabling legislation that gave the SBE authority to enact new desegregation rules based on the draft rules it had earlier endorsed. The enabling legislation was broadly stated. It indicated that, "The state board may make rules relating to desegregation/integration. . . . In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board."[27] In addition, the Legislature passed bonding authority for two new metro magnet schools; set up an office to oversee desegregation efforts; and allotted money for magnet school start-up costs.

While the Legislature authorized the SBE to proceed with rule-making to achieve racial balance, it did not pass all the legislation necessary to enact the rules in the form the SBE has endorsed. Specifically, it did not pass legislation allowing the SBE to require that districts closed for open enrollment purposes be forced to admit minority students from Minneapolis and St. Paul regardless of space. It did not amend current laws to give the SBE authority to reconstitute schools. Nor did it give the Commissioner of Education authority to assume control of schools that fail to close the learning gap. Its grant of authority was phrased in vague terms, and it used the term "equal

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[22]Roundtable Discussion Group on Desegregation/Integration and Inclusive Education, "Final Report To State Board of Education and State Legislature," February 1994, 3.

[23]Ibid., 5.

[24]Gary Orfield provided a "nationwide perspective on desegregation issues." Ibid.

[25]Ibid. Edward Cook of the Minnesota Senate Republican Staff sent a letter to Assistant Education Commissioner Robert Wedl, dated December 22, 1994, asking for the names of individuals who "actually drafted, or reviewed, the rules proposed by the desegregation/integration roundtable in its February 1994 report. . . . More specifically, were attorneys outside of state government used -- if so, which firms or individuals participated?" Wedl's response, dated January 3, 1995, gave the names of Tatel, Leventhal, Henry Buffalo and Charles Vergon of the University of Michigan's Law and Policy Institute as attorneys "used for advice" on the Roundtable proposal. When Tatel spoke to the Roundtable, he addressed "court ordered desegregation issues." Roundtable Discussion Group Final Report, 5.

[26]Council of Metropolitan Area Leagues of Women Voters, 11.

[27]1994 Minn. Laws, Ch. 647, Art. 8, Sec. 1.

educational opportunities" rather than "equal educational outcomes" in the enabling legislation.[28]

As a result, there was some confusion as to how the SBE should proceed with rule-making. At its November 14, 1994 meeting, the SBE's Desegregation/Integration and Inclusive Education Committee agreed to proceed as it wished on matters which the Legislature had been vague or silent.[29] In addition, the Committee tentatively agreed to reintroduce, in the 1995 Legislature, some provisions that had not been approved in 1994. The Committee also reconvened the Desegregation Roundtable to consider whether the draft rules should be changed in any way because of the Legislature's actions.[30]

On January 10, 1995, the Minnesota Department of Education submitted a "proposed desegregation/integration learning policy" to the SBE.[31] The MDE advocated important changes to the rules that the SBE had unanimously endorsed in 1994.

The MDE proposal stressed a new goal: "Racial balance will be improved on a voluntary basis through parent choice." The MDE endorsed the use of "community learning plans" that would seek to reduce "the learning gap between learners living in high concentrations of poverty, who are predominantly persons of color, and their peers . . . ." Districts with over 50 percent minority students would be required to have a desegregation plan that would include "options" for parents, among them both magnet and neighborhood schools. Districts with under 50 percent minority students, but having one or more schools more than 15 percentage points above the district minority average, would be required to have "a desegregation plan which identifies how it will achieve racial balance in the district." This plan could include a neighborhood school choice, "even though such a plan resulted in schools being over the 15 percent rule."[32]

The MDE proposal relied heavily on incentives, rather than mandates and penalties, in both its racial balance and learning gap components. However, it did preserve the reconstitution penalty set forth in the SBE's draft rules, while dropping the specific timeline. The MDE suggested that, "If progress toward closing the learning gap is not achieved over a period of time, the sites which are not successful will need to be reconstituted."[33]

Meanwhile, as the SBE had requested, the Desegregation Roundtable reconvened on December 15, 1994 to consider possible changes to the proposed rules. SBE member Bob Brown told the Roundtable that "the State Board of Education ha[d] not decided on specifically how to successfully approach the Legislature."[34]

The Roundtable considered several significant changes to the draft rules, such as "mov[ing] away from requiring every district in the metro area to plan to move students. (ex. Districts at the edge of the seven counties.)."[35] However, "based on clear consensus," it determined that, "It must be mandatory that every school district in the seven county metro area participate in addressing metro wide desegregation/integration issues and opportunities. . . ." It also recommended that, "All

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[28]Robert Wedl and Robert Miller, Memo to the State Board of Education and Commissioner Powell, November 2, 1994.
[29]State Board of Education Full Board Meeting Minutes, November 15, 1994, 5.
[30]Ibid.
[31]Robert Wedl, "Memo to Georgina Stephens and Members of the State Board of Education," January 10, 1995.
[32]Ibid.
[33]Ibid.
[34]Minnesota Department of Education, Office of Desegregation/Integration, "Summary of Roundtable Discussion Group," December 15, 1994, 2.
[35]Ibid., 4.

metro districts must be required to have plans to close the learning/performance gap."[36] The Roundtable advocated retaining the definition of "segregation" set forth in the 1994 rules. In addition, it recommended reconstitution of schools that fail satisfactorily to close the learning gap, "irrespective of bargaining agreements."[37]

The SBE's February 1995 version of the rules represented an attempt to meld elements of both the MDE's and the Roundtable's proposals.

Currently, the rule-making process is in flux. Strong pressure from potential plaintiffs continues. The Legislature has given the SBE broadly worded enabling authority, but the direction the Board will finally take is unclear. So far, the SBE's most significant action on metro-wide desegregation and related issues is its unanimous and enthusiastic endorsement of the Roundtable's February 1994 report and proposed rules.[38] These rules will set the framework of the debate, and will serve as the benchmark for future alterations. To understand the context in which change will be debated, it is necessary to understand the 1994 proposed rules themselves.

(4) The proposed desegregation rule

The Roundtable's proposed metro-wide desegregation rule requires suburban districts to "desegregate" schools in the two central cities, either by importing urban minority students, or by exporting their own students to schools in Minneapolis or St. Paul. The rule's central feature is the mandatory racial ceiling and floor it imposes on each metro school district. Technically, every district, regardless of the racial makeup of the community it serves, must develop a plan to meet its new quota.

In effect, the proposed rule expands the 15-percent rule to cover all school districts in Hennepin, Ramsey, Anoka, Carver, Dakota, Scott and Washington counties. Even districts only partially located in one of these counties are covered by the new rule. Instead of defining a segregated district in terms of the proportion of minority students at any school relative to the number of minority students *in that district* -- as the current rule does -- the proposed rule defines a segregated district by comparing the district's minority students to the *metro-wide* average of minority students.[39] As of 1994, the metro-wide average of minority students was 16 percent.[40] Thus, under current demographic conditions, if a district is to comply with the new rule, it may not have a minority enrollment greater than 31 percent or less than 10 percent.

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[36]Ibid., 3.

[37]Ibid., 16. All the above recommendations were incorporated in a document entitled Roundtable Discussion Group Recommendations, "Rules Relating to Equality of Educational Opportunity, and School Desegregation/Integration, Chapter 3535," December 15, 1994.

[38]In his transmittal letter to legislative leaders, SBE president John Plocker stated that "The State Board of Education strongly endorses the approach reflected in the Desegregation/Educational Diversity Roundtable's recommendations. These proposals present state policymakers . . . an opportunity to provide strong and creative leadership in addressing one of the critical issues of this decade." Memo to Senator Pogemiller and Representatives. Carlson and Vellenga, February 17, 1994.

[39]"[A] district is considered to be segregated when: 1. a metro area district has a district wide-average that is 15 percent or more over the metro-wide learners of color percentage; or, 2. a district in the metropolitan area: a) has less than 10 percent learners of color in the district; or, b) is below 1/2 of the metro-wide learners of color percentage. A district shall use (a) or (b) whichever is greater." Roundtable Discussion Group Final Report, Appendix D, 5. The 1995 rules also categorize a district as segregated when "any school site in the district . . . varies by more than 15 percent above or below the school district average for the grade levels served by that school site."

[40]Conversation with Robert Miller, director, Office of Desegregation/Integration, March 6, 1995. Miller believes that the metro-area percentage of minority students may have risen to 17 percent, but the Department of Education report that provides this information had not been published as of the date of our conversation.

Under the proposed rule, about 41 metro districts would be defined as "segregated."[41] Minneapolis and St. Paul -- both far above the permissible 31 percent figure -- would be categorized as "racially isolated."[42] The other 39 districts have under 10 percent minority students. These include nearly all the second-, third- and fourth-tier suburbs, along with Edina. When the SBE approved the rules, only nine districts -- Columbia Heights, Burnsville, West St. Paul/Mendota Heights/Eagan, Richfield, Bloomington, Brooklyn Center, Osseo, Robbinsdale and Roseville -- had between 10 percent and 31 percent minority students, and so escaped the segregated label.[43]

The new rule requires both "segregated" and "desegregated" districts to take action to change the racial composition of Minneapolis and St. Paul schools. "Desegregated" districts -- those with over 10 percent and under 31 percent minorities -- must submit a plan setting forth ways in which they will exchange students with the racially isolated districts of Minneapolis and St. Paul.[44]

"Segregated" school systems, however, have a more onerous burden. They must develop a comprehensive, "measurable and results-oriented" "desegregation/integration" plan detailing how they will bolster their minority student population with minorities from other school districts. This plan must spell out how the districts will accomplish a number of other objectives as well. Among these are: "elimination of inter- and intra-district resegregation patterns such as tracking and enrollment patterns in courses or programs; anticipated building and remodeling programs or other sites and programs to be utilized in desegregation/integration efforts; district staffing practices to retain, recruit and prepare educators and staff of color, district affirmative action plans, and timelines for the implementation of each of these."[45] In sum, the plan must include "an array of options to allow for district flexibility for implementation of a plan which establishes desegregation/integration within a district."[46]

The penalty for failing to produce a desegregation plan acceptable to the Commissioner of Education, or to meet the racial quotas or other goals set forth in such a plan, is severe. "Continued non-compliance" may result in reduction of state aids under Minn. Stat. sec. 124.15.[47]

Obviously, the proposed rule would require a massive migration of students between city and suburban districts. To comply with it, Minneapolis would have to cut its minority student population in half, from 61 percent to 31 percent. St. Paul's minority enrollment would have to

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[41]The seven-county metro area includes 50 school districts. However, since the Office of Desegregation/Integration is unable to say how many other districts are partially located in the seven-county area, I have not been able to learn exactly the number of districts that would be affected by the new rule. Conversation with Robert Miller, Director. Office of Desegregation/Integration, February 14, 1995.

[42]The 1994 proposed rule also raises the 15-percent rule's racial ceiling for districts with more than 50 percent minority students. It provides that school sites in such districts will be considered "segregated" if they "var[y] by more than 20 percent above or below the school district average for the grade levels served by that school site." Roundtable Discussion Group Final Report, Appendix D, 5. The 1995 proposed rules do not contain this provision.

[43]Roundtable Discussion Group Final Report, Appendix E. Appendix E contains a list of "metro districts having less than 10% learners of color. The enrollment figures used in the report are from 1992-93. As of that school year, two districts -- St. Anthony and St. Louis Park -- were very close to a minority enrollment of 10 percent. The Department of Education's Office of Desegregation/Integration was unable to provide a list of districts that would be considered desegregated in 1994-95. The nine districts described above as "desegregated" were obtained by comparing the list in Appendix E with a list of all metro-area school districts, and noting those that were not included in Appendix E.

[44]Roundtable Discussion Group Final Report, Appendix D, 9.

[45]Ibid., 8-9.

[46]Ibid., 8.

[47]Ibid., 16.

fall from 52 percent to 31 percent. Thus, Minneapolis would either have to send approximately 12,000 students to suburban districts, or attract thousands of suburban whites to schools within its borders.[48]

Suburban schools, on the other hand, would have to vastly increase their minority student population, or lose large numbers of white students to schools in the cities. According to figures cited in Appendix E of the Roundtable's report, Chanhassen, with 3.3 percent minority students, would have to triple the percentage of minority students in its schools to avoid violating the rule. Other districts would face similar challenges, among them Eden Prairie, with 5.2 percent minority students; Anoka-Hennepin, with 5.09 percent; Minnetonka, with 3.25 percent; Inver Grove Heights, with 5.02 percent; Hastings, with 2.16 percent; Lakeville, with 2.86 percent; Norwood, with 1.81 percent; and Jordan, with 0.39 percent. Some suburbs, like Jordan and New Prague, would have to increase their percentage of minority students by a factor of 25 to comply with the proposed rule's racial requirements.

The proposed rule contains a fundamental inconsistency. Though it imposes mandatory racial quotas on districts as far from the central cities as New Prague and Jordan, it relies on voluntary transfers by individual students to meet those quotas. The SBE has never indicated what grounds it has for believing that thousands of students -- enough to meet hard-and-fast quotas -- will voluntarily agree to be bused dozens of miles from their homes.

Moreover, the SBE has not revealed how a gigantic busing program like this might get off the ground, or how state officials might decide which districts have to do what first, given the long distances thousands of students must travel if racial ceilings and floors are to be met. Urban school officials, mindful of the growing minority populations in first-tier suburbs, have appeared to target second-, third- and fourth-tier communities like White Bear Lake, Wayzata, Minnetonka and Eden Prairie. To this end, legislation introduced in the 1994 session by Sen. Ted Mondale would have provided for busing students up to 50 miles each day.[49]

a. Implications

If the 1994 metro desegregation rule -- or one resembling it -- is approved during the formal rule-making process, it will lead to a revolution in the way education is provided to the 380,000 public school students in the seven-county metro area, who comprise nearly half of Minnesota's school-age population. Minnesotans are right to question whether the proposed rule will accomplish its apparent objectives: To boost the academic performance of urban minority students and improve race relations. They should also question whether the plan the SBE has endorsed is likely to lead to efficient use of scarce education dollars. Under the proposed rule, "racial balance" -- not cost-effective use of education funds, teachers' time and other important resources -- would become the paramount factor in pupil distribution throughout the 2,800-square-mile metro area.

The proposed rule is likely to promote inefficiencies of many kinds. Obviously, it will create daunting logistical burdens. Student transfers of the magnitude required to bring over 40 far-flung districts into compliance with strict racial quotas could be dizzying, especially since racial breakdowns change week by week as some students drop out and others arrive. (Annual turnover in the Minneapolis schools' student population is 30 percent.[50]) If the plan is truly voluntary,

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[48]Conversation with Lyle Baker, director of Policy and Services, Minneapolis School District, February 9, 1995.
[49]S.F. No. 2646, Art. 5, sec. 4, subd. 9a (b) (1994).
[50]Debra O'Connor, "Metropolitan Desegregation Plan Seeks to Bridge the 'Learning Gap'," *Pioneer Press*, April 10, 1994. The logistical problems racial requirements can cause are illustrated by the case of East Hartford, Connecticut, whose schools must comply with a state racial balance law. A recent *New York Times* article describes what happened when "East Hartford fell out of compliance when one minority pupil transferred from his neighborhood

buses carrying very small numbers of students -- perhaps even taxicabs -- would travel between Minneapolis and outlying suburbs like Lakeville. Associated transportation and administrative record-keeping would be immensely costly and complex. Moreover, the complexity of overseeing this process could be compounded if districts which may already be violating the 15-percent rule -- like Osseo and Robbinsdale, along with Willmar and Rochester -- are required to impose intra-district busing.[51]

The proposed rule could also result in extremely inefficient use of classroom space and teacher time. Under the open enrollment law, districts need only take transfer students if they can accommodate them in the space available. However, if the SBE should persuade the Legislature to change the law during its 1995 session, rapidly growing communities like Apple Valley and Eden Prairie will have to accept minority transfer students from Minneapolis and St. Paul regardless of whether they have the classroom space or staff necessary to accommodate them. Given that Minneapolis and St. Paul must essentially halve their minority student populations to comply with the proposed rule, this could mean a significant emptying of Minneapolis and St. Paul schools -- with correspondingly inefficient use of teachers' time and classroom space there -- and a large expansion in already overcrowded suburban schools.[52]

The SBE's proposed rule requires the Commissioner to pass on all plans for school remodeling and construction, approving only those designed to give maximum weight to facilitating desegregation.[53] This policy seems certain to promote inefficiency. Rather than placing schools where they can best accommodate district growth, it will encourage placing them closest to a district's border with Minneapolis or St. Paul. If proximity to a central city is the paramount factor in new school construction and remodeling in districts like Belle Plaine, Mahtomedi and Waconia, students who reside there will probably face longer bus rides than would otherwise be necessary.

Unfortunately, the SBE does not appear to have thought through its ambitious plan, which raises many pressing questions. For example, no one seems to have calculated the total number of students who will have to move if all metro districts are to meet their new racial quotas.[54] Likewise, as will be seen, some research suggests that if desegregation is to have any effect on minority achievement, busing must begin when children are in kindergarten or first grade. Has the SBE considered the effect of busing very young children up to 50 miles a day? The proposed rule makes no exceptions in its racial requirements for elementary schools. It defines all schools as segregated if they do not have enough minority children in every grade, including kindergarten.

b. Rationale for the new rules

Outside the context of a court action, few cities have chosen to adopt a comprehensive race-based busing program. Such programs are costly and undermine neighborhood cohesion, and proponents often have difficulty substantiating claims that they will produce significant benefits.

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school to a magnet school right next door, leaving his original school with one white pupil too many." George Judson, "West Hartford Tries to Cope as Schools Face Integration," *New York Times*, January 23, 1995.

[51]Data provided by Robert Miller, director, Office of Desegregation/Integration, "1993-94 Minority Enrollment Comparison by Schools Within District."

[52]The proposed 1995 rules retain the 1994 rules' requirement that suburban schools closed for open enrollment purposes take urban minority transfer students.

[53]This rule is already on the books as Minn. R. 3535.1100. Though vaguely worded, in the context of the current rules it requires only that *intra-district* racial and socioeconomic balance be taken into consideration. However, if the proposed rules are adopted they will change the context of this rule, which will then require that *inter-district* racial and socioeconomic balance be taken into account when a school is remodeled or a new school is built.

[54]Conversation with Robert Miller, Director of Office of Desegregation/Integration, February 14, 1995. Mr. Miller indicated that this calculation had not been performed.

Consequently, supporters of metro-wide desegregation in this instance confront a difficult challenge. They cannot rely on court action -- no suit has been filed. To obtain a metro-wide busing plan, they must convince the Legislature and SBE that such a plan is advisable, even imperative. Their challenge is compounded by that fact that no court has ever ordered, nor any city voluntarily adopted, a metro-wide plan of the scope the new Minnesota rule envisions. In addition, they must overcome legislators' objections that 20 years of race-based busing have failed to improve minority achievement and race relations in Minneapolis and St. Paul.

In response to these challenges, rule advocates have used a three-pronged strategy with the SBE and the Legislature. First, they have framed the plan as mandatory for school districts, but completely voluntary for individual students. That is, they have insisted that, though racial quotas for all metro districts are mandatory, individual students' participation in the desegregation plan will be strictly voluntary. This tactic has the effect of defusing organized opposition, and making it easier to gain the support of suburban school superintendents, while painting critics as mere bigots. Whether a plan imposing mandatory racial quotas can long remain voluntary for individual students will be considered later in this paper.

Second, and more tellingly, supporters of the rules have taken the position that Minnesota has a *legal obligation* to enact a metro-wide desegregation plan. Some have claimed that if the SBE does not enact such a plan, and if the Legislature does not adequately fund it, a court is likely to impose a far more coercive and costly desegregation scheme. If the Legislature and SBE choose to enact metro-wide busing, they suggest, the state will be able to maintain more flexibility and control over desegregation than a court order would permit.

Finally, despite the disappointing experience of Minneapolis and St. Paul, rule supporters argue that race-based busing will improve both minority academic performance and "multicultural" understanding. Generally, they claim that race-based busing has fallen short on these objectives in Minneapolis and St. Paul because measures to boost achievement have been inadequately incorporated or funded, because "systemic" racism is pervasive, and/or because a "concentration of poverty" has thwarted efforts to help minority students.

Each of these arguments will be considered below.

CHAPTER III
Is There a Legal Obligation to Adopt a Metro Desegregation Plan?

(1) The Desegregation Roundtable's claim

The policy statement of the Desegregation Roundtable's draft rules sets forth the argument that Minnesota has a legal duty to ensure racial balance in metro-area schools.[1] The statement suggests that this duty arises from two sources. First is the 1954 landmark Supreme Court case of *Brown v. Board of Education*.[2] The statement claims that when a central city's schools become heavily minority, *Brown* requires adoption of a racial balance policy incorporating white suburban students.

The statement's second argument rests on the 1972 *Booker* case, which found that Minneapolis schools were illegally segregated. The statement suggests that when the *Booker* judge released the Minneapolis district from court supervision in 1983, the SBE "assumed the legal responsibility to eliminate racial segregation" in the Minneapolis school district. Since urban demographics now prevent the SBE from achieving racial balance in city schools, the claim goes, the SBE has an obligation to use white suburban students to "desegregate" city schools.

Both arguments, as will be seen, are fallacious.

Interestingly, school administrators and the Twin Cities press seem to have accepted the Roundtable's claims about Minnesota's legal obligation to "desegregate" without verifying their accuracy. Typical is a February 1994 *Star Tribune* editorial, which repeats these claims uncritically. After endorsing the proposed rules, the editorial continues: "[T]he Legislature must deliver, by providing dollars to make the plan work and enforcement to ensure all metro school districts take it seriously. . . . If results are not forthcoming by [1995], the courts will certainly intervene, and Minnesotans will rue the day legislators didn't pony up to close the education gap that so affects the future of the state."[3]

Likewise, suburban school officials seem not to have questioned the Roundtable's legal claims. For example, Dennis Laingen, director of curriculum and instruction for the Richfield schools, told the Edina *Sun-Current*, "The courts will order something, so it makes sense for the state to be proactive and do it on a voluntary basis."[4] Likewise, Doug Otto, superintendent of the Anoka-Hennepin schools, told the *Pioneer Press* that, "It's much better to resolve the issue before it gets

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[1]The SBE has made the legal argument a centerpiece of its endorsement of the proposed rules. In forwarding the rules and the Roundtable report to the Legislature after unanimously endorsing them, the Board stated:

"It is not too late for Minnesota to avoid the pitfalls which are currently facing school districts in cities such as Detroit, Newark, Milwaukee, St. Louis and others which are racially segregated . . . . Situations such as these have required significant intervention, frequently court ordered, to address the problem of segregation. The educational community loses control of its schools to the courts. Now is the time for state policymakers to provide strong and proactive leadership. The window of opportunity to do so is closing quickly -- if nothing is done, we face a very serious threat of major litigation, which may result in costly and prescriptive solutions ordered by the courts."

Letter from SBE President John Plocker to Senator Pogemiller, Representative Carlson and Representative Vellenga, February 17, 1994.

[2]347 U.S. 483 (1954).

[3]"Desegregation: New Rule Needs Force, and Dollars, of Law," *Star Tribune*, February 5, 1994.

[4]Lisa Harden, "Plan to Integrate Suburban Schools Gets Green Light," *Sun-Current* (Edina), February 16, 1994.

to court. Then you lose the flexibility to sit down and resolve problems together."[5]

When questioned, however, school officials generally acknowledge that they have no independent basis for their assumptions about what the law requires. Generally, they say they are merely taking on faith what they have heard from the Roundtable or other sources. When I asked one school official for legal precedent to support assertions he had made to a reporter, he seemed uncertain what to say. "I never stopped to think about it," he replied after a silence. "I've heard it for 20 years. I just assumed it's true."

a. The Brown *argument*

The touchstone of federal law on racial segregation is the requirement of discriminatory intent. To hold a school district liable for illegal segregation, a court must find that racial separation in the schools is the result of deliberate, intentional government action, constituting discrimination, in violation of the equal protection clause of the Constitution, on the basis of race. Mere racial imbalance in the schools has never been seen as justifying a finding of illegal segregation -- the requisite factor is proof of illegal government action intended to separate the races.[6] Without proof of a constitutional violation by a government body, a court can have no authority to impose a remedy.[7]

The Desegregation Roundtable's claim that *Brown v. Board of Education* requires Minnesota to adopt a metro-wide desegregation plan is disingenuous. The Roundtable's report does not claim that the State of Minnesota or individual school districts have intentionally discriminated against minority students. Rather, the policy statement in the Roundtable's draft rules implies that Minneapolis and St. Paul schools are illegally segregated -- a situation requiring a legal remedy -- merely because their student bodies are increasingly composed of minority students.

The policy statement opens with a reference to *Brown*: "The State Board of Education reaffirms the holding of the United States Supreme Court in *Brown v. Board of Education* that racially segregated schools are inherently unequal. Racial segregation in schools prevents equal educational opportunity and leads to segregation in the broader society."[8] The Roundtable's claim is that, according to *Brown*, Twin Cities area schools are "separate and unequal" -- and thus in violation of the law -- because most minority pupils reside in the central cities of Minneapolis and St. Paul and attend school there, while metro-area suburban schools (especially outer-ring suburbs) remain largely white.

In essence, the Roundtable is making a startling claim. After 20 years of race-based busing in Minneapolis and St. Paul, Twin Cities schools remain the equivalent of the pre-*Brown* Topeka

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[5]Nancy Livingston, "Integration Plan Requires Suburban Aid," *Pioneer Press*, January 12, 1994.

[6]As the Supreme Court noted in *Freeman v. Pitts*, *Brown* prohibited "[s]egregation with the sanction of law. . . ." 112 S.Ct. 1430, 1443 (1992). "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 112 S.Ct. at 1447. See *United States v. Yonkers Board of Education*: "The mere existence of *de facto* segregation does not create an obligation on the part of a school board to alleviate or rectify such segregation." 624 F. Supp. 1276, 1378 (S.D.N.Y. 1985).

[7]In *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 637 (1991), the Court stated that "The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities." The Court declared, "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . ." Ibid. In *Pitts*, the Court restated this fundamental tenet of school desegregation case law: "A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." 112 S.Ct. at 1445.

[8]Roundtable Discussion Group Final Report, Appendix D, 1.

schools, in which children of different races were segregated by law. Reynaud Harp, former president of the Minneapolis NAACP, has declared this explicitly: "The Twin Cities are still operating under a principle of 'separate but equal' not very different from one struck down by *Brown* . . . with inner cities becoming more heavily weighted with minorities and suburbs maintaining their lily white character."[9]

According to the draft rules, then, *Brown* imposes an obligation on the SBE "to ensure desegregated/integrated schools in Minnesota."[10] The Roundtable, however, conveniently overlooks the fact that the *Brown* Court did not find Topeka's schools "separate and unequal" because there were more black than white children in those schools. The Court ruled Topeka schools illegally segregated because the city's school board had taken *intentional, discriminatory* action to separate children on the basis of race in violation of the Fourteenth Amendment of the Constitution, which requires equal protection of the law for all races.[11]

When it unanimously endorsed the Desegregation Roundtable's report and draft rules, the SBE implicitly endorsed its characterization of *Brown*. Yet the SBE had access to other sources that should have made the Roundtable's mistaken interpretation clear. For example, a House Research Department memo of the time stated the law accurately: "Unless racially segregated schools result from intentional official government action, there is no legal basis for requiring desegregation of a school system."[12] Even the League of Women Voters -- which has strongly supported metro-wide busing for years -- acknowledged the requirement of intentional discrimination in its monograph on the subject: "The Supreme Court considers the operation of racially segregated schools unconstitutional only if the segregation is a result of intentional official government action."[13]

The Roundtable relied on sleight of hand to invoke *Brown* in support of its pro-busing position. Though claiming merely to be applying *Brown*, the Roundtable in fact *redefined* "segregation" in a way that profoundly altered the term's accepted legal meaning. By redefining "segregation" as "the intentional or *unintentional* separation of learners of color within a school district or within a school building,"[14] the Roundtable removed *Brown*'s central requirement of intentional, discriminatory government action, and expanded the term so as to prohibit any racial imbalance, regardless of its cause.

Under the Roundtable's new definition, nearly every school in the metro area -- including urban schools that meet the 15-percent rule's racial balance requirements, and magnet schools created specifically to promote desegregation -- would qualify as impermissibly "segregated." For the rules diverge from *Brown* in another way; they prohibit racial "separation" even within a racially balanced "school building."[15] They also prohibit "resegregation," defined as "intentional or unintentional separation of or discrimination against learners of color or staff of color *within a desegregated building or school district* [16] [emphasis added].

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[9]Laurie Blake, "In Twin Cities Area, Both Desegregation, Debate Over Technique Continue," *Star Tribune*, May 17, 1994.

[10]Roundtable Discussion Group Final Report, Appendix D, 1.

[11]See *Milliken v. Bradley*, 418 U.S. 717, 737 (1974): "The target of the *Brown* holding was clear and forthright: the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils."

[12]Lisa Larson, "School Desegregation," House Research Information Brief, Minnesota House of Representatives, February 1994, 5.

[13]Council of Metropolitan Area Leagues of Women Voters, 36.

[14]Roundtable Discussion Group Final Report, Appendix D, 5.

[15]Ibid.

[16]Ibid.

The draft rules do not define the crucial concepts of racial "separation" or "discrimination," as used in these provisions. But their learning gap mandates require schools to attain racial "parity" in remedial and honors classes, as well as disciplinary measures. Moreover, Hogan & Hartson, the Minneapolis district's legal counsel, advises clients from segregated schools to scrutinize racial balance in nearly every school-related activity -- from foreign language clubs and honor societies, to musical groups like orchestras and bands, to tennis and basketball teams.[17] Given the tendency of some urban education officials and commissions to blame "embedded" or "systemic" racism for racial differentials, metro-area schools are likely to find themselves accused of "segregation" and "discrimination" very frequently, if the draft rules are adopted.

In the debate over metro-wide racial busing, whoever gets to define "segregation" is likely to prevail. Once a school is labeled "segregated," it seems logical to insist that it be "desegregated;" to argue otherwise seems immoral. (Clearly, no one likes to be put in the position of defending "segregated" schools.) Advocates of the new rules invoke *Brown* in defense of their definition of "segregation" because *Brown* is a landmark case, with the advantage of both wide public recognition and great moral weight. By radically redefining "segregation," while claiming merely to be applying settled law, rule advocates create an impression in the public mind that Minnesota has a legal duty to ensure "racial balance" in its schools. Unfortunately, few Minnesotans -- whether legislators, educators or ordinary citizens -- are in a position to evaluate the accuracy of the Roundtable's characterization of the *Brown* holding.

In the battle for public opinion, *Brown* is a powerful weapon. Its power is indicated by its plasticity -- *Brown* is frequently invoked to justify completely inconsistent positions. Thus, in the same *Star Tribune* article in which Reynaud Harp characterized *Brown* as requiring metro-wide busing, another black leader insisted just as vehemently that *Brown* justifies the operation of all-black schools.[18]

The second legal argument raised in the Roundtable's policy statement is related to its misguided appeal to *Brown*. Both arguments rely on the misconception that, even though no constitutional violation has occurred, "racial imbalance" alone is sufficient to trigger a legal obligation to "desegregate" schools.

The Roundtable claims that demographic changes over the last decade impose a duty on the SBE to ensure racial balance in city schools by busing students of different races across city-suburb lines. According to the policy statement, "Since [1983], housing and migration patterns in the state's metropolitan areas have rendered effective desegregation impossible within the boundaries of individual school districts. The State Board thus recognizes and declares that the responsibility to desegregate schools within each of the state's metropolitan areas is shared by the State Board and all school districts in each metro area."[19]

It is important to understand the misleading implication here. Obviously, the State Board may *choose* to enact a rule imposing "responsibility to desegregate" metro schools on "all school districts in each metro area." But it cannot claim that it has a legal obligation to do so. The racial composition of Minneapolis and St. Paul schools has changed in recent years, in part because of

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[17]"Unitary Status Hypothetical," undated, distributed at a Desegregation and Funding Workshop conducted by Hogan & Hartson, March 11-12, 1994 in Washington, D.C. This hypothetical examines the racial balance question from the perspective of districts seeking release from court order, i.e., a declaration of unitary status.

[18]The article quotes Ella Mahmoud, founder of the Seed Academy and Harvest Preparatory School in Minneapolis, which is 98 percent black: "' I don't think that our objective is to be desegregated. Our objective is to make sure that the child feels good about who they are. . . .' It is in the spirit of the Brown decision to 'accept these children for who they are,' [Mahmoud] said." Laurie Blake, "In Twin Cities Area, Both Desegregation, Debate Over Technique Continue," *Star Tribune*, May 17, 1994.

[19]Roundtable Discussion Group Final Report, Appendix D, 2.

"white flight" from the central cities to avoid mandatory busing. However, federal law clearly holds that, unless changes in racial demographics are caused to a significant extent by intentional governmental discrimination, there is no affirmative duty to ensure racial balance in schools.

b. Dowell *and* Pitts

Two recent Supreme Court cases are of direct importance here. In both cases -- *Board of Education of Oklahoma City v. Dowell,*[20] decided in 1991, and *Freeman v. Pitts*,[21] decided in 1992 -- the Supreme Court considered the extent of districts' obligations to ensure continued racial balance in their schools once a court order has been lifted.

In *Dowell*, the Court held that a school district that has been under court order to desegregate does *not* have a perpetual duty to maintain "racial balance" in its schools. Once the district has shown good faith compliance with the court order, and has eliminated vestiges of the original discrimination to the extent "practicable," it must be released from the order and granted "unitary status"; i.e., a finding that it no longer operates a racially discriminatory "dual" school system. A desegregation decree cannot be imposed on a school district for the "indefinite future," regardless of demographic changes that might take place within a district's boundaries.[22]

Dowell made clear that, once a district obtains unitary status, it has no obligation to continue mandatory busing or a racial balance plan. It may even return to geographic or neighborhood attendance zones for its schools, so long as this change is motivated by legitimate educational concerns, rather than a discriminatory intent to separate racial groups.[23]

In *Freeman v. Pitts*, which involved the schools of DeKalb County, Georgia, the Supreme Court answered a question it had not directly addressed in *Dowell*. DeKalb's schools had been 5 percent black in 1969, when the district implemented a court-ordered desegregation plan. Seventeen years later, when DeKalb filed a motion for unitary status, the county's enrollment had become almost 50 percent black. The appellate court held that until DeKalb had complied with all aspects of the court order (including faculty and principal assignment), it must ensure racial balance in its schools -- using mandatory racial busing, if necessary -- even though current imbalances resulted from demographic changes that had occurred after compliance with the 1969 court order.

Overruling the appellate court, the Supreme Court held that a school district is not responsible for remedying racial imbalance that develops after it has complied with its original court order, so long as this imbalance is a result of purely demographic factors, rather than intentional government discrimination. The Court declared: "Once the racial imbalance due to the *de jure* violation has

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[20] 498 U.S. 237, 111 S.Ct. 630 (1991).

[21] 502 U.S. --, 112 S.Ct. 1430 (1992).

[22] 111 S. Ct. at 637-38.

[23] 111 S.Ct. at 637. *Dowell* concerned the public schools of Oklahoma City. The district court had found that the Oklahoma City School Board had complied with an earlier desegregation order. Facing demographic changes that led to greater burdens on young black children, the Board wished to adopt a neighborhood school plan. Respondents filed a motion to reopen the case, contending that the school district had not achieved unitary status and that the new plan amounted to a return to segregated status. Noting that federal supervision of local school systems is intended as a temporary measure, the Supreme Court remanded the case for a decision as to whether the School Board had made a sufficient showing of constitutional compliance to allow dissolution of the injunction. Should the district court find that the Board had complied in "good faith" with the desegregation decree, and that "vestiges of past discrimination had been eliminated to the extent practicable," the neighborhood plan would be constitutional. 111 S.Ct. at 638. See also, David J. Armor, *Forced Justice: School Desegregation and the Law* (Oxford University Press, 1995) (forthcoming). "The Harm and Benefit Thesis," ch. 3. References to *Forced Justice* will be to chapters, rather than page numbers, since the book is not yet in print.

been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors," including "resegregation" due to white flight.[24] The Court noted that changes in residential patterns may occur for many reasons, and emphasized the important role of personal preferences and private choices that have no "constitutional implications."[25]

Pitts' import for the Minneapolis situation is clear. The *Booker* court released Minneapolis from court supervision, finding good faith compliance, though the district never sought a formal declaration of unitary status. Subsequent demographic change in Minneapolis has no "constitutional implications," and does not require continuing plans to ensure racial balance in the district's schools, unless such change has been caused, in significant part, by illegal and discriminatory government action intended to separate the races. Both *Dowell* and *Pitts* indicate that Minneapolis may return to a policy of neighborhood schools -- even though this increases racial imbalance -- so long as educational objectives are the prime motivation.

To sum up, the Roundtable's claim that Minnesota has an affirmative legal obligation to ensure "racial balance" between city and suburban schools is wrong. Minnesota schools are not illegally "segregated" according to *Brown*, nor do the Minneapolis schools have a duty, under federal law, to maintain racial balance in perpetuity. (Of course, neither St. Paul nor any other metro school district -- besides Minneapolis -- has ever been under court order to remedy segregation.) If the Roundtable offered convincing evidence that unconstitutional government action has significantly promoted "resegregation" in Minneapolis since 1983, matters might be different. But the Roundtable neither offers, nor alludes to, any such evidence[26]

(2) The federal threshold for inter-district busing

The Roundtable's failure to grasp the pivotal role of intentional, discriminatory government action in federal desegregation law explains its misunderstanding of both the *Brown* holding, and the implications of recent demographic changes for urban schools. This blind spot leads the Roundtable to make an additional, related mistake. The policy statement of the draft rules implies that, once a central city's schools become heavily minority, courts will automatically look to largely white suburban schools to ensure metro-wide racial balance. In fact, courts will not order inter-district desegregation -- even when city schools are almost entirely minority -- unless suburban school districts themselves are proven guilty of illegal discrimination.

Long-standing federal case law raises a further obstacle in the path of those contemplating court action to win a metro-wide "desegregation" plan. Courts will not order a metro-wide plan merely because plaintiffs prove a constitutional violation on the part of one or more suburban districts. Since its 1971 decision in *Swann v. Charlotte-Mecklenberg Board of Education*,[27] the Supreme Court has insisted that the scope of a desegregation *remedy* be consistent with the nature of the constitutional *violation*.[28]

Thus, even if plaintiffs suing Minnesota could prove that one or more metro school districts had acted with illegal discriminatory intent, or that the state itself had done so, a federal court would not

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[24]112 S.Ct. at 1447-48.

[25]Ibid. at 1448.

[26]Some rule advocates assert that the concentration of public housing and homeless shelters in Minneapolis has illegally contributed to racial "segregation" in the Minneapolis school district. The role of housing discrimination claims in school desegregation cases is considered elsewhere in this paper.

[27]402 U.S. 1 (1971).

[28]402 U.S. at 16.

order comprehensive metro-wide busing. Rather, it would fashion a remedy consistent with the scope of the violation; i.e., it would order remedial action only in the affected districts. Given this restriction, plaintiffs would find it almost impossible to win the kind of comprehensive busing plan that the new rules impose.

a. Milliken v. Bradley

The law of the land on interdistrict desegregation is the 1974 Supreme Court case of *Milliken v. Bradley*.[29] Because the circumstances of *Milliken* closely resemble those in the Twin Cities, the case makes clear just how high a hurdle plaintiffs in a Minnesota suit would face in federal court.

Like potential Minnesota plaintiffs, the *Milliken* plaintiffs argued that Detroit, whose school district was 64 percent black at the time, could not effectively desegregate its schools unless the court ordered 53 suburban school districts to participate in a metro-wide busing plan. The Court noted that the case raised, for the first time, "the fundamental question . . . as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district."[30]

The Court held that -- whatever the racial imbalance in central city schools -- metro-wide desegregation plans are justified only if suburban districts, or the state, have acted in racially discriminatory ways themselves:

> Before the boundaries of separate and autonomous school districts may be set aside by . . . imposing a cross-district remedy, it must first be shown that there was a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.[31]

The Court ruled that, absent a showing of such violations, an inter-district desegregation order is "a wholly impermissible remedy."[32]

Explaining its holding, the *Milliken* Court stressed the central importance of local district autonomy, and emphasized the tremendous logistical problems that large-scale inter-district busing generates. In addition, it reaffirmed *Swann's* holding that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[33] In the event a violation is proven, said the Court, an inter-district remedy is appropriate only insofar as it "eliminate[s] the interdistrict segregation *directly caused* by the constitutional violation [emphasis added]."[34]

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[29]418 U.S. 717, 94 S.Ct. 3112 (1974).
[30]418 U.S. at 741.
[31]Ibid. at 745.
[32]Ibid.
[33]Ibid. at 744.
[34]418 U.S. at 745.

*b. Post-*Milliken *case law*

Today, most large urban school districts in the United States are heavily minority. Yet in the last 20 years, federal courts have ordered comprehensive metro-wide desegregation in only two cities, Indianapolis and Wilmington, Delaware.[35]

In both Wilmington and Indianapolis, courts ruled that the *Milliken* requirement had been met. Plaintiffs were able to show discriminatory state actions that had caused significant inter-district segregation. In both cities, when metropolitan boundaries had been expanded or consolidated, heavily black school districts had been intentionally left out. In the case of Wilmington, the court found that the state legislature had impermissibly excluded Wilmington from a statute authorizing the Delaware Board of Education to consolidate school districts without voter approval.[36] Where Indianapolis was concerned, the court found that the Indiana Legislature had wrongly excluded the city's school system from a reorganization plan that extended city boundaries to include surrounding areas of the county for all purposes but education.[37]

Only in Wilmington did the court order a comprehensive, two-way mandatory busing plan to attain racial balance in all metro schools. The court dissolved city and suburban districts, and replaced them with one large school district.[38] In Indianapolis, the court left boundary lines intact, and approved a one-way busing plan that enabled black students to attend predominantly white suburban schools.

Though court-ordered metro-wide desegregation plans are rare, plaintiffs have often sought them. Since *Milliken*, plaintiffs have requested metro-wide remedies in lawsuits involving the cities and suburbs of Atlanta,[39] Kansas City,[40] Milwaukee, Cincinnati and Goldsboro, NC.[41] In most of these cases, plaintiffs attempted to prove that the state and/or local school districts had committed illegal discrimination by contributing to housing segregation between city and suburbs,[42] a claim plaintiffs are likely to make in Minnesota.

In the Atlanta, Kansas City, and Goldsboro cases, courts rejected plaintiffs' claims that inter-district constitutional violations had occurred. In all three cases, the courts did find constitutional violations affecting city schools, but confined desegregation remedies to those schools alone. In both the Milwaukee and Cincinnati cases, suburban school districts agreed to out-of-court settlements involving voluntary inter-district plans, whereby black students could voluntarily transfer to suburban school districts up to a specified percentage.[43] In St. Louis, the district settled out of court to forestall a potential court order, and agreed to a voluntary plan that permitted black students to attend schools in the suburbs, and white students to choose city schools.

Of all these metro cases, the Supreme Court reviewed only the Atlanta case. Lower court decisions

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[35]*Forced Justice*, "Desegregation Policy and the Law," ch. 2.

[36]*Evans v. Buchanan*, 393 F. Supp. 428, 438 (D. Del. 1975). The court did not find that the legislature had intentionally discriminated. Rather, it held that the 1975 exclusion was unconstitutional because it interfered with the State Board's ability to eliminate the vestiges of *de jure* segregation that the court had already found in the Wilmington school district.

[37]*United States v. Bd. of School Comm'rs of Indianapolis*, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd in relevant part*, 637 F.2d 1101 (7th Cir. 1980).

[38]This one large district has since been reorganized into four separate districts, each containing a part of the city.

[39]*Armour v. Nix*, No. 16708 (N.D. Geo. 1979).

[40]*Jenkins By Agyei v. State of Mo.*, 807 F.2d 657 (8th Cir. 1986).

[41]*Goldsboro City Bd. of Ed. v. Wayne Co. Bd. of Ed.*, 745 F.2d 324 (4th Cir. 1984).

[42]*Forced Justice*, "Desegregation Policy and the Law," ch. 2.

[43]Ibid.

in the other cases tended to reinforce the principles of *Milliken*, particularly the requirement that remedies must be tailored to specific constitutional violations.[44]

The way in which this principle was applied in a case involving the schools of the Little Rock metro area is particularly instructive. Plaintiffs in that case requested consolidation of several school districts, but the appellate court found such a remedy to exceed the scope of the violation that had been established. The court merely ordered that the boundaries of the suburban district that had committed the violation be adjusted in relation to the Little Rock school district, and approved a program of voluntary inter-district transfers.[45]

(3) Attempts to get through *Milliken's* "loophole"

Milliken presents a serious obstacle to potential plaintiffs in a case against the State of Minnesota. To win a metro-wide desegregation order, they would have to prove that "racially discriminatory acts of the state or local school districts . . . have been a substantial cause of interdistrict segregation."[46] If Minnesota plaintiffs bring suit in federal court, they could try to make such a case by relying on any of three kinds of claims: boundary claims, "learning gap" disparities, and housing patterns.

a. Boundary claims

In Wilmington and Indianapolis, plaintiffs prevailed because they were able to show that metropolitan boundaries had been discriminatorily changed in a way that excluded largely black school districts. In the Twin Cities, however, most school district boundaries were drawn many years ago, when the area's minority population was very small. (As recently as 1963, Minneapolis schools were only 6 percent minority.) Plaintiffs would find it very difficult to convince a federal court that these boundaries were drawn with a racially discriminatory purpose in mind.

Plaintiffs might allege that a previous school district consolidation involving Golden Valley and Hopkins had unlawfully contributed to racial separation.[47] In 1980, these districts consolidated because of Golden Valley's small size and financial situation. Previously, there had been limited discussions between Minneapolis and Golden Valley about student exchanges of several kinds, though these never materialized.

Today, some potential plaintiffs suggest that Minneapolis should have been included in the Golden Valley/Hopkins consolidation for desegregation purposes. While events are difficult to reconstruct, Minneapolis officials do not appear to have requested consolidation at the time. Even if they had, there would have been no legal obligation on the part of the Commissioner of Education to approve such a consolidation.[48] But in the highly unlikely event that a court determined that the circumstances of the Golden Valley/Hopkins consolidation amounted to

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[44]Ibid.

[45]*Little Rock School District v. Pulaski County Special School District, No 1*, 778 F.2d 404, 434-36 (8th Cir. 1985).

[46]418 U.S. at 719.

[47]Somewhat similar claims regarding other districts have also been made, but the Golden Valley-Hopkins consolidation is mentioned most often.

[48]Some potential plaintiffs suggest that Minn. R. 3535.1100, in effect at the time, required the Commissioner to approve only consolidations that furthered metro desegregation. However, 3535.1100 pertains not to consolidations, but to "selection of sites for new schools" and "plans for addition to existing building[s]." Moreover, though vaguely worded, it must be interpreted in light of its context as part of a rule dealing only with intra-district desegregation.

intentional government discrimination, it would fashion a remedy affecting only the districts involved.

b. The learning gap as a "vestige"

The Supreme Court requires a school district operating under a desegregation order to eradicate "vestiges" of former illegal segregation "as far as practicable" before it can be declared unitary and released from its court order. In recent years, some plaintiffs have attempted to block a finding of unitary status by portraying racial differences in academic performance, or dropout and discipline rates, as "vestiges" of past segregation. They claim that racial differences are *caused* by former segregation, rather than by other factors, such as socioeconomic differences. Even if a district has attained perfect racial balance, these plaintiffs argue that court supervision should continue until all "vestiges" are eliminated; i.e., until racial outcomes are equivalent.

Federal courts have generally rejected this position.[49] However, in January 1995, the Supreme Court heard arguments in *Missouri v. Jenkins*, a case which squarely raises the issue. In *Jenkins*, the State of Missouri petitioned for unitary status for the Kansas City schools, where a court-ordered desegregation plan costing well over $1 billion has operated for eight years. The Eighth Circuit Court of Appeals rejected Missouri's bid, ruling that minority students' failure to reach national norms on standardized tests is a "vestige" of former segregation.[50] In response, Missouri has argued that low student achievement is caused by many factors beyond the schools' control, for which the district cannot be held responsible, and that the Eighth Circuit's ruling went far beyond the constitutional requirement of equal protection to impose an "outcome-based standard wholly foreign to traditional equal protection analysis."[51]

Hogan & Hartson represents the Kansas City School Board in its suit against the State of Missouri.[52] Hogan & Hartson also represents the Minneapolis School Board. However, Minneapolis is likely to raise the learning gap in a state court action, rather than a federal court action, as will be explained later in this paper. In a federal context, other potential plaintiffs could attempt to reopen the *Booker* case, characterizing the district's current learning gap as a vestige of former segregation,[53] and claiming that further relief is warranted. Such a claim would be unlikely to succeed, given the 1983 *Booker* order's dissolution of the injunction, and the district's careful compliance with the original order's requirements.

The Supreme Court's decision in *Jenkins* will probably be released before the desegregation rule-making process is complete in Minnesota. Whatever the Court's decision, it will do little to bolster Minnesota plaintiffs' slim chances of winning a metro-wide desegregation order in federal court. At most, it could raise problems for the Minneapolis district if plaintiffs challenge its decision to pursue a neighborhood school policy.

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[49]The vestige argument, though relatively new, has been raised in a number of cases, including those involving Dallas, San Jose, Topeka and Wilmington, Delaware. Only in *United States v. City of Yonkers*, 833 F. Supp. 214 (S.D. N.Y. 1993), did plaintiffs use the argument successfully. The *Yonkers* suit sought funds to close the gap.

[50]*Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993).

[51]Linda Greenhouse, "High Court to Review Kansas City School Desegregation Case," *New York Times*, September 27, 1994. Eighth Circuit rulings are of particular interest to Minnesota, which is in the Eighth Circuit.

[52]In 1977, the Kansas City School District and student plaintiffs filed suit against the State of Missouri, suburban districts and other defendants. The Kansas City School District was realigned as a defendant in 1978 and cross-claimed against the state.

[53]*Jenkins v. Missouri*, 11 F. 3d 755 (8th Cir. 1993).

c. Claims of housing discrimination

In a federal desegregation suit against the State of Minnesota, plaintiffs would probably make Twin Cities housing patterns a focus of their case. For some years, various individuals and groups have claimed that suburban zoning and subsidized housing policies here were designed to limit minority population growth in the suburbs. They assert that the State of Minnesota has encouraged such policies,[54] and also claim that federal agencies have promoted segregated schools by employing discriminatory practices[55]

However, a desegregation suit based on housing claims is very unlikely to succeed. David Armor is a prominent social scientist who has studied desegregation-related issues for 20 years, focusing particularly on minority achievement and the link between housing and school desegregation issues.[56] In his forthcoming book, *Forced Justice: School Desegregation and the Law*,[57] Armor observes that no court has ruled that housing discrimination *alone* constitutes the intentional government action necessary to trigger a busing remedy.[58] Plaintiffs continue to include such allegations in school desegregation suits, but the strategy of using them as the primary basis for claims of constitutional violation appears largely to have failed.[59]

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[54]Minneapolis school officials characterize racial performance gaps as a function of segregation, though the *Booker* court found that segregation had ended 12 years ago. For example, Lyle Baker, district director of Policy and Strategic Services, recently declared that "the question facing us in deseg is, what are the appropriate remedies to overcome the effects of segregation. . . ." Laurie Blake, "New Racial Study Fuels Desegregation Debate," *Star Tribune*, January 7, 1995. However, in a court action the district's position will probably be that the learning gap demonstrates that students are not receiving a constitutionally mandated "adequate education."

[55]Claims of this kind were outlined by University of Minnesota law professor John Powell at the seminar on metropolitan desegregation held at the Hamline University School of Law on December 2, 1994.

In January 1995, the United States government tentatively agreed to pay $100 million to settle a suit brought two years before by the Minneapolis Legal Aid Society and the NAACP. Neither the government nor Minneapolis, which was also a defendant, seriously defended the suit, noting that they shared "similar values" with plaintiffs. Minneapolis' interests were well-served by settling, for the city gained $100 million for new public housing by doing so. However, neither Minneapolis nor the federal government has admitted discriminatory wrong-doing in the matter.

[56]Armor began his study of desegregation-related issues in 1965, when he participated in James Coleman's seminal study, *Equality of Educational Opportunity*. He is presently a Senior Fellow at the Institute for Public Policy at George Mason University, and a consultant to the American Institutes for Research. He is Principal Investigator of a grant to study the factors that contribute to black achievement gains, and co-principal investigator on a national study of magnet schools sponsored by U.S. Department of Education. He has served as a consultant to numerous school districts, and has helped design a number of desegregation plans. Armor has testified as an expert witness in some of the most influential desegregation cases of recent years, including Milwaukee, Atlanta, Hartford, Yonkers, Little Rock and Topeka. He is currently consulting on school desegregation and choice issues in Topeka, Phoenix, San Jose and Wilmington, Delaware.

[57]Forthcoming from Oxford University Press in 1995.

[58]*Forced Justice*, "Housing Segregation and School Desegregation," ch. 4. Some courts have found housing discrimination to be a partial basis for ordering some sort of busing plan. This occurred, for example, in Oklahoma City (*Dowell v. School Board of Oklahoma City*, 244 F. Supp. 971 (D.C. Ok. 1965)); Pasadena (*Spangler v. Pasadena*, 311 F. Supp. 501 (D.C. Cal. 1970)); and Charlotte-Mecklenberg, N.C. (*Swann v. Board of Education*, 318 F. Supp. 786 (D.C. N.C. 1971)). The courts in these cases did not make a significant attempt to distinguish between public and private housing discrimination. Only the *Swann* case was reviewed by the Supreme Court.

[59]In both *Swann* and *Milliken I*, the Supreme Court avoided the question of whether housing discrimination, by itself, could serve as the basis for a desegregation order. Though housing issues were raised in the Wilmington and Indianapolis cases, boundary changes were also at issue.

In *Armour v. Nix*, No. 16708 (N.D. Geo. 1979), plaintiffs made government housing discrimination the center of their case. *Armour v. Nix* was a metropolitan school desegregation case that involved the school districts of Atlanta, three suburban cities and six large suburban counties. Plaintiffs relied largely on claims that government-induced housing discrimination had caused school segregation. The district court found that, in the past, local governments outside of Atlanta had discouraged blacks from moving in, and that the location of public housing had

Though housing discrimination (both public and private) has been illegal for many years,[60] courts tended until recently to assume that such discrimination caused racial residential clustering in urban areas. In recent years, however, courts have grown more sophisticated in their analysis of the factors that lead to racial clustering. As analytical tools have improved, courts have increasingly found that contemporary racial clustering is largely the result of private choice and economics.

Today, plaintiffs generally continue to rely on large-scale HUD "audit" studies, and similar analyses, to support claims that racial clustering is primarily a function of government discrimination. Defendants' experts, however, tend to rely on complex statistical surveys and simulations capable of examining the many factors that contribute to demographic change. Such sophisticated surveys and simulations have played an important role in at least 10 recent school desegregation cases: Those involving Atlanta, Omaha, Kansas City, St. Louis, Milwaukee, Cincinnati, Little Rock, Los Angeles, Hartford and Nash County, NC.[61]

Armor explains that housing patterns are influenced by a number of factors, among them economics (cost and affordability), convenience (proximity to jobs, friends and shopping), and personal preferences for racially homogeneous neighborhoods.[62] For example, in a study of Kansas City housing patterns he performed for the *Jenkins* case, Armor found that blacks and whites tend to work in different places, and choose their residences in part because of proximity to jobs. Eighty percent of black workers in Kansas City are employed in the central city; more often than whites, they work for public agencies with offices there. Only 54 percent of whites, by contrast, work in the city.[63]

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concentrated black residents in Atlanta. However, the court stressed the role of personal preference in housing decisions, and did not find that present levels of housing segregation were mainly caused by government discrimination. The Supreme Court affirmed this holding in 1980. 446 U.S. 930 (1980).

In the Kansas City metropolitan case, plaintiffs claimed in part that government housing discrimination had caused inter-district school segregation. They alleged that state enforcement of racially restrictive covenants, and other practices, had channeled black and white low-income families to separate communities. However, the district court dismissed suburban districts as defendants, since there was no showing that suburban districts themselves, not just any government agency, had contributed to inter-district housing discrimination. The court rejected plaintiffs' claims that HUD had contributed to inter-district segregation by locating housing projects within Kansas City; by funding local housing agencies which had failed in their duty to prevent segregation; by providing funding and insurance to white suburban areas that restricted blacks; and by establishing guidelines that required segregation in housing prior to 1948 and permitted it after that year. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984).

This ruling was upheld by the Eighth Circuit, which found that the case presented no "significant inter-district current effects," as required by *Milliken* for an inter-district desegregation order. *Jenkins v. Missouri*, 807 F.2d 657, 674 (8th Cir. 1986). The Atlanta and Kansas City decisions remain the last important federal court rulings on the role of housing discrimination in metropolitan school desegregation cases. However, in *Yonkers*, an intra-district case, the district court found that intentional concentration of public housing had caused substantial intra-district school segregation. The court ordered Yonkers to build subsidized housing in other parts of the city, and also ordered school desegregation because of separate school violations. *Yonkers*, however, presented a unique factual situation, as the judge found very close collaboration between city authorities responsible for siting of public housing and officials responsible for schools. *United States v. Yonkers*, 624 F. Supp. 1276 (1985). See *Forced Justice*, "Housing Segregation and School Desegregation," ch. 4.

[60]Prior to *Brown*, official discrimination in housing was widespread. Its manifestations included racially restrictive zoning (primarily in the South), official segregation in public housing projects, discrimination in the FHA's financing and insurance practices, and racially restrictive covenants in deeds, which were enforceable until the Supreme Court prohibited them in 1948. *Shelley v. Kraemer*, 334 US 1 (1948). See *Forced Justice*, "Housing Segregation and School Desegregation," ch. 4. All racial discrimination in the sale or rental of housing is illegal under Title VIII of the 1968 Civil Rights Act.

[61]*Forced Justice*, "Housing Segregation and School Desegregation," ch. 4.

[62]Ibid.

[63]Ibid.

In 1978, Reynolds Farley of the University of Michigan's Population Studies Center conducted a seminal study of the causes of racial housing patterns.[64] Farley examined black and white housing preferences in Detroit. He found that while only 15 percent of blacks questioned said that living in a majority-white neighborhood would be their first choice, 76 percent expressed a preference for 50-50 or majority-black neighborhoods. Whites questioned preferred to live in racially mixed neighborhoods, but 64 percent said they would try to leave if a neighborhood became 50 percent black. As a result of this mismatch of preferences on racial composition of neighborhoods, Farley concluded that, "the likelihood of achieving stable integrated neighborhoods in the Detroit area is small."

In 1992 Farley replicated his 1978 work. He found that, "There has been a significant shift among whites toward more tolerant attitudes about residential integration."[65] However, he observed that "When the preferences of Detroit-area blacks in 1976 and 1992 are compared, we find little change." Specifically,

> Most Detroit-area blacks preferred areas that were racially mixed but already had a substantial representation of blacks. The ideal neighborhood for blacks was one where blacks comprised at least half the residents. . . . [M]ost blacks were reluctant to be the pioneer who integrated an all-white neighborhood. About one-third of the black respondents in 1992 said they would do so, but this is a significant decline from 1976. Although the changes in the residential preferences of blacks are small, they suggest a slight shift away from residential integration.[66]

Housing studies by Armor and his colleague William Clark have confirmed Farley's finding that a mismatch between black and white racial preferences explains the bulk of current urban residential patterns. Over a period of 13 years, Armor and Clark performed surveys in eight cities in connection with school desegregation lawsuits.[67] They found that, though a majority of both blacks and whites in these cities preferred to live in racially mixed neighborhoods, their preferences concerning racial makeup differed. Only 18 percent of blacks preferred majority-white neighborhoods, while a majority of whites preferred neighborhoods that were between 10 percent and 50 percent black. Most whites who wanted to live in mixed neighborhoods preferred a 20-percent black/80-percent white mix. Interestingly, a 20/80 ratio mirrors the racial composition of the typical metro area.[68]

Citing data of these kinds, Armor concludes that black preferences are vitally important in explaining residential racial clustering. According to him, if black households were allocated to meet white preferences alone, almost perfect racial balance would be attained -- because average white preferences approximately match the average percentage of black residents in metropolitan areas, as just noted. On the other hand, blacks prefer neighborhoods with higher black ratios than well-integrated neighborhoods would offer in most metropolitan areas. In fact, the fifty-fifty

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[64]R. Farley, H. Schuman, S. Bianchi, D. Colasanto, and S. Hatchett, "Chocolate City, Vanilla Suburbs: Will the Trend Toward Racially Separate Communities Continue?" *Social Science Research*, 7:319-44, 1978.

[65]Reynolds Farley, Charlotte Steeh, Tara Jackson, Maria Krysan, and Keith Reeves, "Continued Racial Residential Segregation in Detroit: 'Chocolate City, Vanilla Suburbs' Revisited," *Journal of Housing Research* 4:1-38, 1993, 27.

[66]Ibid., 22.

[67]These cities were Omaha (1978), Kansas City (1982), Cincinnati (1983), Little Rock (1984), Milwaukee (1986), Los Angeles (1987), Nash County, N.C. (1990) and Hartford (1991). Results from some of these studies were reported in David J. Armor, "School Busing: A Time for Change," in P.A. Katz and D.A. Taylor, *Eliminating Racism* (Plenum, 1988), and William A.V. Clark, "Residential Segregation in American Cities," *Population Research and Policy Review*, 5:95-127, 1985.

[68]*Forced Justice*, "Housing Segregation and School Desegregation," ch. 4.

neighborhoods blacks tend to prefer are exactly the types of neighborhoods that many whites would leave, thereby increasing racial imbalance. Blacks tend to avoid predominantly white neighborhoods, which would be the most common sort of neighborhood in a metropolitan area that was fully racially balanced.[69] In sum, Armor determines that substantial racial imbalance is the inevitable mathematical result of black preferences for fifty-fifty neighborhoods in a region that is 80 percent white.[70]

Thomas Schelling has confirmed Armor's conclusions by demonstrating mathematically that relatively small differences in preferences for differing racial compositions can lead to a fairly large degree of segregation over a large population.[71] Armor's colleague, William Clark, has tested and verified Schelling's thesis by using preference data from five of the eight cities he and Armor studied.[72]

In several major school desegregation cases, courts have relied heavily on Armor's housing analyses. His work played a central role in cases involving Atlanta and Kansas City. In Atlanta, Armor found that, taken alone, black preferences accounted for 82 percent of racial housing clustering, while in Kansas City, black preferences accounted for 76 percent. When he added white responses to neighborhood change to his simulations, Armor was able to show that 91 percent of housing "segregation" in Atlanta, and 86 percent in Kansas City, was a result of factors other than discrimination.[73]

On the basis of statistical analyses by Armor, the Supreme Court found in the *Pitts* case that racial housing patterns in DeKalb County, an Atlanta suburb, were a function of private choice. According to the Court:

> The findings of the District Court that the population changes which occurred in DeKalb County were not caused by the policies of the school district, but rather by independent factors, are consistent with the mobility that is a distinct characteristic of our society . . . . The District Court in this case heard evidence tending to show that racially stable neighborhoods are not likely to emerge because whites prefer a racial mix of 80 percent white and 20 percent black, while blacks prefer a 50 percent-50 percent mix. Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.[74]

If plaintiffs in a metropolitan desegregation suit against the State of Minnesota allege only housing discrimination, they are unlikely to prevail.[75] If they claim that current racial residential clustering

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[69]*Forced Justice*, "Housing Segregation and School Desegregation," ch. 4.

[70]Ibid.

[71]Thomas Schelling, "Dynamic Models of Segregation," *Journal of Mathematical Sociology*, 1:143-186, 1971.

[72]William A. V. Clark, "Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model," *Demography*, 28:1-19, 1991.

[73]*Forced Justice*, "Housing Segregation and School Desegregation," ch. 4.

[74]112 S.Ct. at 1447-48.

[75]In the *Jenkins* case, the plaintiffs made claims of this kind, but the district court rejected them. Dismissing suburban school districts as defendants, the court stated:

> [N]o [suburban district] in any significant way influenced the housing patterns in the Kansas City metropolitan area. . . . [T]he Court rejects plaintiffs' "effect" theory that liability may be placed on the [suburban districts] for being the recipients of people moving for whatever reason. Absent a nexus between the conduct of the defendant [suburban districts] and the housing actors, the Court will not find the [suburban districts] liable for racial imbalance that may be attributed to policies or practices of independent housing actors. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984).

in Minneapolis is a vestige of the district's former segregated status, the fact that 12 years have passed since the lifting of the *Booker* order will pose a problem for them. In the *Pitts* case, the Court observed that the passage of time, along with demographic changes, render it less likely that racial imbalance in a district is a vestige of the former dual school system.[76]

If a court considering a Minnesota desegregation case did find housing discrimination of some kind, it would tailor its remedy to the scope of the violation. Conditions in metro area school districts would be considered case-by-case, in both the liability and remedy phases of the trial. Thus, an order imposing a comprehensive metro-wide busing plan as a remedy for housing violations seems almost inconceivable.

(4) The SBE's alleged duty regarding *Booker*

As has been seen, Minnesota plaintiffs would find it difficult to get through the *Milliken* loophole. They would be hard-pressed to show that intentional, discriminatory government action has contributed significantly to inter-district school "segregation" in the Twin Cities. But the Desegregation Roundtable does not claim that Minnesota's legal duty to enact metro-wide desegregation rests on federal, constitutional grounds alone. In the policy statement to the draft rules, the Roundtable asserts that this duty springs in part from a second source: The role the SBE played in the *Booker* case.

The Roundtable's claim is as follows:

> In addition to its obligations to ensure desegregated/integrated schools in Minnesota, the State Board in 1983, assumed the legal responsibility to eliminate racial segregation in the Minneapolis Special School District No. 1. In reliance upon the State Board's action, the federal district court dissolved its supervision of the Minneapolis Public School's [sic] desegregation plan. *Booker v. Special School District No. 1*, No. 4-71 Civ. 382 4 (D. Minn. 1983) . . . .

The policy statement continues: "Since . . . housing and migration patterns" have rendered "effective desegregation impossible within the boundaries of individual school districts," the obligation the SBE assumed in connection with *Booker* now requires it to "desegregate schools within each of the state's metropolitan areas."[77]

The Roundtable's argument here is confused and difficult to follow. Apparently, the claim is that by assuming responsibilities in connection with desegregation in one district -- Minneapolis -- the SBE acquired both the authority, and the obligation, to "desegregate" all metro school districts.

Is it accurate to say that in 1983 the SBE assumed "the legal responsibility to eliminate racial segregation" in Minneapolis, and that the federal court dissolved its supervision of the district "in reliance" on the SBE's action? In his final order, Judge Larson noted that the existence of the 15-percent rule, adopted 10 years before, had influenced his decision to dismiss the *Booker* case. He observed that "the Minnesota Department of Education has established a policy to ensure the elimination of racial segregation and to provide equal educational opportunity,"[78] but did not confer new responsibilities in this regard on either the SBE or the Department of Education. Approving a five-year desegregation plan for the district -- to run from 1983 to 1988 -- the judge observed that the Commissioner of Education had reviewed the plan. The Commissioner, he said,

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[76]112 S.Ct. at 1448.

[77]Roundtable Discussion Group Final Report, Appendix D, 1-2.

[78]*Booker et al .v. Special School District No. 1*, No. 4-71 Civ. 382 (D. Minn. June 8, 1983) (memorandum order).

had stated that the plan satisfied the 15-percent rule, and that after dismissal of the suit, its implementation "would be monitored in accordance with the Rules of the State Department of Education."[79]

Judge Larson indicated that he was releasing Minneapolis from court supervision for several reasons, among them the district's new pro-desegregation school board, and the five-year desegregation plan about to go into effect. Granting defendants' motion to dissolve the permanent injunction and dismiss the action, the judge stated merely that "the State Department of Education should and will *monitor* the implementation of the long-range plan [emphasis added]."[80]

Clearly, Judge Larson did not see either the SBE or the Department of Education as "taking over" the court's supervisory role. In his final order, he pointed out that the court had "no intention to retain jurisdiction indefinitely," and stated straightforwardly that, "The Court finds and believes that the District should have the opportunity for *autonomous compliance* with constitutional standards [emphasis added]."[81]

The Roundtable is mistaken in its claim that *Booker* somehow conferred on the SBE authority to use suburban students to "integrate" Minneapolis (or St. Paul) schools 12 years after the suit was dismissed. As has been seen, the Supreme Court's decision in *Pitts* established that demographic changes that follow lifting of a court order -- even if they result in "resegregation" -- have no constitutional implications, unless they are a result of intentional, discriminatory government action.

Moreover, the *Booker* court had jurisdiction over only one district: Minneapolis Special School District No. 1. Judge Larson never purported to have authority to address conditions in any other district, or to fashion a remedy that affected other districts. He found a constitutional violation only in Minneapolis, and fashioned a remedy that pertained only to Minneapolis students. All the judge's references in his order are in the singular, and apply to Minneapolis alone: "the *district's* desegregation plan;" "equal educational opportunity within *a school system*," etc. [emphasis added].

Clearly, then, the Roundtable cannot claim that in 1995, the SBE somehow derives from *Booker* authority exceeding that which the federal court itself wielded while the case was still active. If Judge Larson had never released Minneapolis from its court order -- if he retained jurisdiction himself today -- he could not order a metro-wide desegregation plan to alleviate Minneapolis' growing minority enrollment. Such an order would directly contradict the Supreme Court's holding in *Milliken*. Nor does the 15-percent rule itself require the state to devise a metro-wide desegregation plan. The rule applies only to individual school districts with one or more schools that violate its racial ceiling -- currently, Minneapolis, St. Paul and Duluth. The rule has no legal import for other, non-offending districts, nor does it require the SBE to abridge the autonomy of such districts in order to change the racial balance in urban districts.

If demographic changes make it impossible for Minneapolis to comply with the 15-percent rule's racial ceiling, the solution is clear. The SBE should remove the racial ceiling. This, of course, is the solution that the SBE was considering in 1992, when a challenge by potential plaintiffs led it to reject it. The SBE cannot convincingly claim, by appealing to the final order in *Booker*, that it has a legal obligation to impose a remedy that a federal court itself would be barred from considering.

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[79]Ibid.
[80]Ibid.
[81]Ibid.

(5) The state court scenario

Given the obstacles they would face in federal court and the weakness of their *Booker*-related claim, plaintiffs seeking a metro-wide desegregation order would probably file suit in state court. State court school desegregation suits are very new. Plaintiffs in the few that have been filed have employed a theory called "educational equity." Other state plaintiffs have simply sought more state money for poor urban districts, rather than framing their demands in terms of race. These plaintiffs have used an "educational adequacy" theory. Both causes of action are attractive to plaintiffs because, unlike federal constitutional suits, they may not require proof of an *intent* to discriminate.

In employing educational equity and educational adequacy theories, plaintiffs seek to bypass increasingly conservative federal courts in favor of state courts, which tend to be more liberal today. Both new theories seek to build on the success of recent "equity financing" suits, in which state courts have declared schemes for state financing of education unconstitutional. As a result of such litigation, today a majority of states have equity financing laws, which require "equitable" sharing of funds by high- and low-wealth school districts.

a. Educational equity theory

The only well-known "educational equity" case to date -- *Sheff v. O'Neill*[82] -- was filed in 1989 in Connecticut state court by the NAACP and the Hartford school district. Plaintiffs claim that racial "imbalance" in Connecticut schools violates both the equal protection and due process guarantees of the Connecticut Constitution, which establishes the right to an education and also prohibits "segregation" and "discrimination."[83] To remedy this constitutional violation, plaintiffs seek court-ordered racial balance between Hartford's school system -- which is 92 percent minority -- and surrounding suburban school systems. Connecticut also has a law, passed in 1969, that requires racial balance in the schools of each district.

Plaintiffs' "educational equity" claim takes the following form. First, they allege that Hartford and surrounding suburban school districts are racially "segregated" since minorities tend to cluster in the city and whites in the suburbs. Then they point to the "learning gap" that exists between urban minority students and white suburban students. The next step is crucial: Plaintiffs insist that the city-suburb racial imbalance *causes* the racial learning gap. They claim that, by tolerating racial separation which, in turn, causes different racial academic outcomes, Connecticut is violating its own Constitution.

The *Sheff* plaintiffs have requested that the state court remedy Connecticut's constitutional violation by establishing metro-wide desegregation, through metro-wide racial quotas or a merger of city and suburban school districts. Their argument is that, because racial clustering leads to unequal educational outcomes (and because the state Constitution prohibits "segregation), the state has a legal obligation to disperse minority students among suburban schools. The State of Connecticut argues that the court cannot order a desegregation remedy unless plaintiffs prove discriminatory intent on the part of suburban districts,[84] and maintains that racial performance differentials are the result of socioeconomic factors.

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[82]No. CV-89 360977 S (Super. Ct. Conn.) (decision pending).

[83]Art. 1, sec. 20 of the Connecticut Constitution states that, "No person shall be denied equal protection of the laws or be subjected to segregation or discrimination. . . ."

[84]For a general discussion of the *Sheff* case and the situation in Connecticut, see George Judson, "Voluntary Integration: A Wary Connecticut Struggles to Get to Square 1," *New York Times* (National Edition), October 7, 1994.

Though suit was filed in 1989, the *Sheff* court has not yet resolved the matter, or even issued findings. Final arguments were presented on November 30, 1994. In these arguments, the judge requested the parties to address whether a state law passed after the suit was filed had, in fact, rendered the case moot. This new law permits Connecticut school districts to make strictly voluntary "integration" plans, but contains no quotas or mandates. Districts are not required to participate, and so far only five new magnet schools have been proposed for Connecticut's 508,000 public school students under the new law's provisions.[85] At this point, Minnesota plaintiffs cannot point to *Sheff* as providing strong precedent for a successful educational equity case here.

Some proponents of the new rules mention New Jersey as a state where educational equity theory has been successful. New Jersey cases have turned on state courts' power to order that school districts be merged, or "regionalized," in order to promote racial balance.

The New Jersey Constitution requires the state to provide a "thorough and efficient" education. State courts have interpreted this clause as requiring district merger to prevent "segregation" in only two cases, both decided many years ago. In *Booker*, a 1965 case, the court ruled that the New Jersey commissioner of education has a duty to ensure that learning occurs in schools that are not *de facto* segregated, as such schools do not provide the quality education to which children are entitled.[86] In *Jenkins v. Morris*,[87] a 1971 case, a court compelled merger to prevent segregation between two districts -- a small, heavily minority "inner borough" and the larger district that completely surrounded it. The holding of the *Morris* case was not repeated.

In a recent case, *Board of Education of the Borough of Englewood Cliffs v. Board of Education of the City of Englewood*,[88] the matter arose in a different context. New Jersey has small "feeder" school districts that contract for high school services with larger districts. A state statute prohibits breaking a "sending-receiving" contract if this would have an adverse effect on desegregation. Over the years, as larger districts have become heavily minority, feeder districts have sometimes tried to break their contracts.

In *Englewood Cliffs*, a feeder district petitioned to sever the contract relationship, and the receiving district counter-petitioned for mandatory regionalization. However, rather than ordering regionalization under the state constitution, the court ruled only that the New Jersey State Board of Education may order district merger if it believes such a step is warranted.[89]

"Educational equity" theory may not require plaintiffs to prove discriminatory intent on the part of defendant government entities. But it presents them with another challenge: The need to convince courts that the racial learning gap is caused by racial imbalance between urban and suburban schools, rather than by differences in the socioeconomic status or family circumstances of individual students in those schools. This is a difficult argument to make persuasively, as the experience of Wilmington, Delaware demonstrates.

Wilmington and surrounding suburban schools were combined into one large district by court order in 1982.[90] As a result, schools there have been almost perfectly racially balanced for 13 years. Yet the racial learning gap has not narrowed; it continues to mirror the national racial gap.

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[85]Ibid.

[86]*Booker v. Board of Education of the City of Plainfield*, 212 A.2d 1 (N.J. 1965).

[87]*Jenkins v. Township of Morris School District and Bd. of Ed.*, 279 A.2d 619 (1971).

[88]608 A.2d 914 (N.J. 1992).

[89]Ibid. at 951.

[90]Subsequently, this single metropolitan district was reorganized into four separate districts, each containing part of the city.

When Wilmington seeks unitary status in upcoming hearings, the district's experts will testify that over 80 percent of the current gap results, not from racial separation, but from the socioeconomic status and family circumstances of individual students.[91]

Twenty years of busing for racial balance has not significantly narrowed the learning gap in either Minneapolis or St. Paul. Yet the Desegregation Roundtable's proposed rules contain language that may be intended to foreclose the state of Minnesota from using the Wilmington defense, should an educational equity suit be filed here. In their current form, the draft rules state that, "It is the policy of the State Board to prevent the concentration of racial and *socioeconomic segregation* in the schools and to ensure that school districts shall participate in a fair measure to help prevent racial and *socioeconomic segregation* [emphasis added]."[92] Likewise, the Roundtable's proposed learning gap rule requires districts to ensure that all racial groups achieve "equal educational results," defined as "educational results that demonstrate equal/equitable progress being achieved across racially and *economically diverse* groups of learners. . . ."[93] [emphasis added]

If Minnesota has to defend an educational equity suit in the future, it may wish to argue that it has no legal duty to impose metro-wide desegregation because socioeconomic factors -- not city-suburb racial imbalances -- account for the racial learning gap. But if the state, and individual school districts, have previously assumed a duty to prevent socioeconomic "segregation," as well as to achieve equal outcomes among "economically diverse groups of learners," plaintiffs may argue that an inter-district busing remedy is warranted regardless of whether racial or socioeconomic factors are to blame for the learning gap.[94]

The viability of educational equity theory -- still so new and untested -- may be decided in the near future. Over the next nine months, both state and federal courts will probably issue rulings bearing on plaintiffs' attempts to link racial balance and academic performance. As previously noted, the U.S. Supreme Court may rule this spring on whether the racial learning gap in the Kansas City schools is a vestige of segregation. The federal court in the Wilmington case, and the *Sheff* court in Connecticut, will consider similar questions. If the Supreme Court grants Kansas City unitary status despite the persistence of the gap; if the federal district court grants Wilmington unitary status under the same circumstances; and if the *Sheff* court finds that Connecticut's new voluntary law moots the educational equity suit there, advocates of educational equity may find their theory seriously discredited.

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[91]David J. Armor, "Evaluation of Desegregation in New Castle County: A Report Prepared for the Delaware House Committee on Desegregation," November 28, 1994. The Wilmington situation will be discussed in detail later in this paper.

[92]Roundtable Discussion Group Final Report, Appendix D, 2. Note that Minn. R. 3535.1100 already contains a reference to socio-economic segregation. Specifically, the rule states: "All decisions by local boards concerning selection of sites for new schools and additions . . . shall take into account, and give maximum effect to, the requirements of eliminating and preventing racial as well as socioeconomic segregation in schools. The commissioner will not approve sites for new school building construction or plans for addition to existing building[s] when such approval will perpetuate or increase racial segregation."

This rule only requires attention to racial and socioeconomic balance *within* districts, rather than *among* districts (though some have argued otherwise). Furthermore, it requires the commissioner to withhold approval of plans that would not foster racial balance, but makes no such requirement concerning socioeconomic balance.

[93]Roundtable Discussion Group Final Report, Appendix D, 3. The 1995 proposed rules are similar, stating that "Equal educational achievement results when equitable progress is being achieved across racially and economically diverse groups of learners." "Revised Recommendations from the Roundtable Discussion Group" (Rules Relating to Equality of Educational Opportunity, and School Desegregation/Integration), Chapter 3535," February 13, 1995.

[94]The SBE should state clearly what language regarding "socioeconomic segregation" means. To what does such language commit the state, and individual school districts? Busing for socioeconomic "integration" is almost unprecedented. When the La Crosse, Wisconsin school board enacted such a policy several years ago, it made national news. Eventually, those on the board who had voted for the measure were recalled in a special election.

b. Educational adequacy theory

In December 1994, the Minneapolis school district retained the Hogan & Hartson law firm to investigate bringing an educational adequacy suit against the State of Minnesota. Such a suit would argue that Minneapolis students' poor performance indicates that they are not receiving the adequate education the Minnesota Constitution guarantees them. Plaintiffs would claim that the district needs a substantial increase in state funds in order to provide students with a constitutionally acceptable education.

Hogan & Hartson -- well known as plaintiffs' lawyers for school districts seeking state funds -- is a proponent of "educational adequacy theory," the second cause of action available to plaintiffs who choose a state court venue to avoid the obstacles posed by federal law. As noted previously, David Tatel, then of Hogan & Hartson, addressed the Desegregation Roundtable on legal issues. Educational adequacy cases are sometimes brought in conjunction with finance equity cases, which claim that a state's method of distributing educational resources is unconstitutional. However, the Minneapolis school district is unlikely to file a finance equity action, because the constitutionality of Minnesota's education financing scheme was upheld in 1993.[95]

According to a recent article by one of its attorneys, Hogan & Hartson regards Minnesota as vulnerable to an educational adequacy suit. This article, "Recent Developments in School Finance Equity and Educational Adequacy Theory," provides a useful explication both of the relation between finance equity and educational adequacy theory, and of the strategy Hogan & Hartson might adopt in a future suit against Minnesota on behalf of the Minneapolis School District.[96]

The article begins by explaining the nature of a finance equity claim:

> Finance equity claims typically allege that a state's formula for distributing financial resources to public schools is inequitable, in violation of a state constitution's education clause, equal protection clause, or both. Finance equity claims focus principally on the disparities in funding available to schools in high-wealth and low-wealth school districts within a state. Thus, the 'injury' that a finance equity claim seeks to remedy or alleviate is the gap between the levels of funding available in high-wealth and low-wealth school districts.[97]

The article then makes the connection between finance equity theory and educational adequacy theory:

> An educational adequacy claim focuses directly on inadequacies in the level of educational opportunities offered in one or more school districts within a state, and asserts that some students are not receiving adequate educations as measured by state-defined or other contemporary education standards. An educational adequacy claim does not complain about disparities in funding among school districts, per se, but instead claims that one or more districts cannot provide their students with an adequate education, generally due to the high needs of their students and the lack of local resources to meet those needs, without regard to the level of funding available to other districts in the state.[98]

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[95]*Skeen v. State of Minnesota*, 505 N.W.2d 299 (Minn. 1993).

[96]Paul Minorini, "Recent Developments in School Finance Equity and Educational Adequacy Theory," *ERS Spectrum*, Winter 1994.

[97]Ibid., 3.

[98]Ibid.

After explaining the link between finance equity and educational adequacy theory, the article considers the legal environment that Minnesota offers for litigation of this kind. Specifically, it examines *Skeen v. Minnesota,* [99] decided by the Minnesota Supreme Court in August 1993. In *Skeen,* the court held Minnesota's current school finance system constitutional:

> In *Skeen*, the court agreed with plaintiff school districts that education is a fundamental right under the Minnesota Constitution. However, the court indicated that the constitution merely requires Minnesota to provide schools with the basic funding necessary to ensure that all students obtain an adequate education. Since plaintiffs acknowledged that they were in fact able to provide such an education to their students, the court found that no constitutional violation existed.[100]

The article concludes that, "While this case represents a loss for the plaintiffs on their funding equity claims, the decision leaves the door open for a *future challenge* based on educational adequacy [italics added]."[101]

Conceivably, the Minneapolis School Board could bring either an educational equity or an educational adequacy suit. In an equity case, which would focus on racial learning disparities, plaintiffs would probably seek a metro-wide busing remedy, along with greater funding. In an adequacy case, which would focus on inadequate funding for high-need districts, they would probably seek funding increases alone.[102] If plaintiffs adopt an adequacy theory, which seems very likely, the way in which an "adequate" education is defined in Minnesota would be of particular importance.

Education adequacy theory is very new, and -- like educational equity theory -- largely untested. The Hogan & Hartson article just discussed observes that though educational adequacy cases had been brought in Rhode Island, Louisiana and Idaho as of the article's publication date, findings had not been issued in those cases.[103]

The article stresses the importance of two cases decided in 1993: the Massachusetts case of *McDuffy v. Secretary of Education,*[104] and the Alabama case of *Harper v. Hunt.*[105] According to the article, the Massachusetts Supreme Court held in *McDuffy* that the Massachusetts Constitution guarantees all public school students an education which permits them to acquire seven broadly defined capabilities.[106] The court found that, at least in plaintiff school districts, such an education was not being provided. It deferred to the state legislature to fashion educational reforms to bring the education system into compliance.[107] In *Harper*, an Alabama trial court declared the state's

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[99]505 N.W.2d 299 (Minn. 1993).

[100]Minorini, 4.

[101]Ibid.

[102]In conjunction with this claim, the district might challenge what it perceives as state policies that concentrate academically disadvantaged children in the Minneapolis school system. The district would assert that homeless shelters and public housing are clustered in Minneapolis, while the suburbs have relatively little subsidized housing.

[103]A Lexis search in February 1995 turned up nothing on any of these cases.

[104]615 N.E.2d 516 (Mass. 1993).

[105]No. CV-91-117-R (Cir. Ct. Ala.) (1993).

[106]These included broadly worded capabilities like "sufficient knowledge of economic, social and political systems to enable students to make informed choices;" "sufficient grounding in the arts to enable each student to appreciate his or her culture;" and "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently." Minorini, 8.

[107]Subsequent to the *McDuffy* ruling, the Massachusetts Legislature passed a law reorganizing state financing of education.

entire system of public education unconstitutional under the state constitution's education and equal protection clauses.

The article states that *Harper* is thus far unique, because it combined traditional funding equity theory with educational adequacy theory. Citing dropout rates and some students' lack of preparation for college or the work force, the *Harper* judge ruled that Alabama students were not receiving an adequate education by any standard. The judge mandated vast expenditures to carry out his order:

> The total estimated cost of the reforms that will result from the court's order is $508 million in the first year, between $508 and $942 million in the second through sixth years, and $942 million annually each year thereafter. It remains to be seen how the state legislature and public will respond to the funding challenges presented by such figures.[108]

According to the article, the judge ordered that "the state must provide all schools with adequate resources and with the authority necessary to achieve the results for which they will be held accountable."[109] He ordered Alabama schools to ensure that every student, including those with disabilities, develop seven capacities he described as essential components of an adequate education.[110] He mandated that schools "identify barriers to learning, such as health needs and family dysfunction, and develop plans for the best ways to minimize these barriers." In addition, he ordered that Alabama teachers be compensated at levels "sufficient to attract and retain teachers who are capable of effectively helping students achieve at high levels."[111]

Many Minnesotans would likely view the *Harper* judge's order as a vast judicial overreaching, usurping both local control and state supervision of education. But Hogan & Hartson views the matter differently. From the firm's perspective, *Harper* should inspire school districts to seek massive increases in state funds by arguing to state courts that their students need such funds to meet basic performance standards. The article concludes:

> The landmark Alabama case described here is remarkable for the willingness of the court to involve itself in the details of education policy. The summary presented here merely scratches the surface of the sweeping reforms ordered by the court . . . . Such a far-reaching and prescriptive judicial order not only has monumental importance to the entire education system in Alabama, but also has important implications for the future of court-ordered school reform in educational adequacy cases nationwide.[112]

Despite Hogan & Hartson's assertion that *Harper* has "important implications for the future of court-ordered school reform," the circumstances of the case appear unique. Alabama's Gov. Guy Hunt was the only defendant in the case; plaintiffs included the Lieutenant Governor, the State

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[108]Minorini, 10.

[109]Ibid. Minorini states that the judge ordered that Alabama's funding scheme must direct greater resources to children with measurably greater educational needs, through targeted allocations and/or student weighting.

[110]These read like the *McDuffy* components, and include sufficient written and oral communication skills to function in society; sufficient knowledge of economic, social and political systems to enable students to make informed choices; and sufficient training and skills to choose and pursue one's life work and to compete in the regional and national job market. The judge ordered the state to develop student performance objectives and learning goals, and to develop courses of study based on these. He also prohibited tracking, mandated transition services for high school students with disabilities, and required the State to develop assessment strategies related to the performance objectives. Minorini, 10.

[111]Minorini, 11.

[112]Ibid.

Board of Education, the State Superintendent of Education, the Alabama Legislature's Speaker of the House, and the State Director of Finance.[113] Alabama is a rural state with a system of education financing tied largely to local taxes, and *Harper* was essentially a finance equity case intended to change the state's school financing scheme. In Alabama, all schools stood to gain financially from the *Harper* litigation. If the Minneapolis School District sues the State of Minnesota, it will not enjoy the almost unanimous support of state officials that the *Harper* plaintiffs did.

Despite these differences, with Hogan & Hartson on board, Minnesota may become a national test case for the viability of educational adequacy theory. Given the firm's influence with the Desegregation Roundtable and Minneapolis School Board, citizens should insist on knowing how the SBE's new desegregation rules will facilitate the success of future litigation against the State of Minnesota.

In particular, Minnesotans need to know that the state's adoption of outcome-based education in general -- and its new graduation rule in particular -- may play a central role in a future educational adequacy suit. The Hogan & Hartson article discussed above explains why this is so. "How [outcome and delivery] standards are worded will undoubtedly affect their potential use by plaintiffs in litigation," the article declares. "State officials, educators, and education advocates will no doubt watch closely and attempt to influence the development of such standards over the next several years."[114]

The outcomes eventually adopted in Minnesota will become the standard for an "adequate" education in this state. To the extent that students fail to achieve these outcomes, plaintiffs may claim that additional state funding is constitutionally required. Potential plaintiffs are monitoring development of Minnesota's outcome standards with future litigation in mind. Yet it is unlikely that many in the Legislature or on the SBE are aware of the role that the wording of these outcomes may play in an eventual suit against the State.

In fact, plaintiffs in an educational adequacy suit against Minnesota may look beyond state-adopted outcomes in an effort to prove that the state has failed to provide students with a constitutionally adequate education. At a recent workshop attended by one or more representatives of the Minneapolis School District, Hogan & Hartson advised districts that they may not be providing equal educational opportunities to their students if racial disparities exist on any of four measures: test scores, dropout rates, discipline rates, and rates of participation in remedial and honors classes.[115] Not surprisingly, the Roundtable's 1994 draft rules make closing racial gaps on just these measures a *legal requirement* for Minnesota districts with more than 30 minority students. If the SBE adopts this requirement, it will facilitate future plaintiffs' claim that failure to close racial gaps is a constitutional violation warranting a massive infusion of state funds.

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[113]In the remedy stage of the trial, which is ongoing, these state officials have been realigned as defendants. The court has granted a motion to continue while Alabama's new Republican governor and other new state officials determine their position on the matter. The Alabama Legislature, which did not resist the suit during the liability stage of the trial, refused recently to pass two bills intended to implement educational reform. Conversation with Ashley Hamlet, Associate Counsel, Alabama Department of Education, February 9, 1995.

[114]Minorini, 3.

[115]This workshop on desegregation and funding was held March 11-12, 1994 in Washington, D.C. and was attended by School Board member Judith Farmer. Seminar materials suggested that administrators from segregated districts ask, "Are equal educational opportunities provided to members of all racial/ethnic groups?" and consider four factors by way of answering: test scores, dropout rates, rates of placement in gifted and special education programs, and student discipline (suspensions and expulsions). The undated document in which this subject was discussed was entitled "Possible Approaches to Desegregation Issues After *Dowell* and *Freeman*."

(6) The new rules enhance the chance of a successful suit

Proponents of the Roundtable's draft rules have insisted that the SBE must voluntarily enact a metro-wide desegregation plan to avoid a more costly and comprehensive court-ordered plan. We have seen that a federal court would be very unlikely to order such a plan, and that the theories plaintiffs might use in state court are new and largely untested. Paradoxically, however, by enacting the Roundtable's proposed rules, the SBE will actually improve both the likelihood and the success of future litigation.

The foregoing analysis indicated that, in some ways, the proposed desegregation rules seem crafted to enhance the success of a state court suit against Minnesota. At the moment, the crucial causal connection between the learning gap and racial clustering of students would be difficult to make convincingly. However, the new rules would bolster plaintiffs' case by making the duty to close the gap a legal responsibility of the state. And they would impose this duty regardless of whether the gap is due to racial clustering or to socioeconomic factors beyond the control of schools.

Clearly, requirements to reduce or close the learning gap would pose a serious danger in a state suit. But they could also aid plaintiffs in a federal action. The apparently unique case of *United States v. City of Yonkers* stands as a cautionary tale for Minnesota. In *Yonkers*, a 1993 case, a federal judge found the racial gap on reading and math scores to be a vestige of illegal segregation. The *Yonkers* litigation had begun in 1985, when the City of Yonkers was found to be operating segregated schools.[116] In the 1993 case, the Yonkers Board of Education and the NAACP claimed that "vestiges of segregation" remained in the system which, "though capable of being remedied or eradicated, [were] not being adequately addressed."[117] Hogan & Hartson was brought in to represent the Yonkers Board of Education in its suit against the State of New York for money with which to address these "vestiges."

The *Yonkers* court had explicitly rejected plaintiffs' claim that the racial gap was evidence of discrimination in 1985.[118] However, in 1991, the New York Education Department published a policy document on which the court relied in altering its position on the gap. In "A New Compact for Learning: Improving Public Elementary, Middle and Secondary Education Results in the 1990's," the Department had declared that *equal outcomes or results*, rather than equal inputs or opportunities, were of paramount importance.[119] In finding Yonkers responsible for the gap, the court stated, "Our point is not that some State criterion is allegedly being violated by the [Yonkers Public Schools]. Rather the point is that it is accepted doctrine among educators that one looks to results to measure equity of educational opportunity."[120]

The *Yonkers* case seems aberrational in a number of important respects, as few, if any, other courts have found the learning gap to be a constitutional violation in this context. Moreover, the Yonkers argument would be difficult to use in a metro-wide context, in particular where no school district is defined as segregated under federal law. But the new Minnesota rules would make closing or reducing the gap a legal obligation, and would redefine most metro districts as "segregated," with consequences that are difficult to predict. The Minnesota rules seem designed

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[116] *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D. N.Y. 1985).

[117] 833 F. Supp. at 217.

[118] 624 F. Supp. at 1438, n. 110

[119] "A New Compact" stated, "Our mission is not to keep school -- it is to see that children learn. The energies of all participants should be focused on achieving the desired outcomes. Accountability does not end with following established rules and procedures: its essence is found in results . . . . The requirement is not equality of input, but equity of outcome." 214 F. Supp. at 221.

[120] Ibid. at 221.

to make state liability a foregone conclusion.

The proposed rules pose another, more significant danger in the context of a federal suit. As we have seen, *Milliken* presents a serious obstacle to potential plaintiffs seeking metro-wide desegregation. Under current conditions, such plaintiffs would find it very difficult to prove a constitutional violation on the part of suburban school districts, or the state government, sufficient to trigger a metro-wide busing remedy.

If the proposed rules are enacted, this could change. Currently Minnesota has no legal obligation to ensure "racial balance" in metro-area schools. But the proposed rules *create* such a duty by imposing a mandatory racial quota on each metro school district. Districts that fail to meet their quotas will be out of compliance with state law. In a few years, plaintiffs may file suit to remedy the situation, and a federal court might well order metro-wide busing to ensure that state-imposed racial quotas are met.

Under the new rules, "desegregation" is described as mandatory for school districts, but wholly voluntary for individual students and their families. This distinction, however, could well prove illusory. School districts -- particularly those in second-, third- and fourth-tier suburbs -- are highly unlikely to achieve minority quotas of 10 percent by relying on voluntary transfers alone. In an editorial on the subject, the *Star Tribune* observed, "The board's plan requires only voluntary student mixing based on color -- an option families deserve even though few will probably choose it."[121] An October 1992 survey of parents in Minneapolis and first ring suburbs described in the *Sun-Current* newspaper found that only 13 percent would be very likely to send their children to another district.[122]

Likewise, few minority families from the central cities are likely to choose schools in Forest Lake or New Prague for their children. Despite open enrollment, only 191 Minneapolis students -- 180 of them minority students -- transferred from Minneapolis to suburban districts in 1992-93.[123] As one activist put it:

> I think that you would find if you looked at both the open enrollment and history of choice that the number of people who are strongly motivated to move to get something special are [sic] relatively small. . . . The idea that often underlies [an] all-magnet metro desegregation proposal is that everybody is just dying to send their kids to the suburbs. And it's my perception that that's not true."[124]

In fact, national evidence confirms the difficulty of achieving large-scale racial transfers on a voluntary basis alone. Cities with voluntary city-suburb busing plans have found recruiting white suburban students particularly challenging. In St. Louis, only 1,200 white students chose to attend school in the city in 1993-94.[125] In Kansas City the figure was 1,400, with 65 percent failing to return the following year.[126] In Milwaukee, under 1,000 white students attend magnet

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[121]"Desegregation: New Rule Needs Force, and Dollars, of Law," *Star Tribune*, February 5, 1994.

[122]Lisa Harden, "Plan to Integrate Suburban Schools Gets Green Light," *Sun-Current* (Edina), February 16, 1994.

[123]Laurie Blake, "Metro Desegregation: An Uphill Battle," *Star Tribune*, January 16, 1994. Note, however, that non-minority children generally cannot leave Minneapolis and St. Paul under the open enrollment program.

[124]Ibid.

[125]Figures for white transfers in St. Louis and Kansas City were obtained in a telephone interview with Tim Sweeney, Desegregation Services Department, Missouri Department of Elementary and Secondary Education, February 7, 1995.

[126]Rochelle Sharpe, "Controversial Missouri Schools Project Is Bringing Modest Gains, Study Finds," *Wall Street Journal*, April 26, 1994.

schools in the city.[127] Despite these low numbers, all these programs are extremely costly. The Roundtable's proposed desegregation rules would require transfers on a far greater scale here.

In sum, in upcoming hearings to determine the thresholds that will define "segregated" school districts, the SBE should be aware of how the language adopted will affect future litigation. To the extent that the final rules contain quotas of any sort, they will invite litigation if these quotas are not achieved. The 1995 version of the rules poses just as great a peril, for it requires districts to "eliminate segregation to the greatest extent possible," an essentially unattainable open-ended standard.

The SBE should also be aware of the significance of broad policy language in which the state and individual school districts accept responsibility for ensuring racial balance throughout the metro area. The draft rules' policy statement contains language of this sort:

> The State Board . . . recognizes and declares that the responsibility to desegregate schools within each of the state's metropolitan areas is shared by the State Board and all school districts in each metropolitan area . . . . Since education is the responsibility of the State, desegregation/integration is not the responsibility of a single district, rather a broader sharing of responsibility between and among districts and between districts and the State. Thus, the State Board recognizes the need for interdistrict efforts to promote Desegregation/Integration.[128]

As *Milliken* made clear, neither states nor suburban school districts have an affirmative duty under the Constitution to ensure racial balance in metro-area schools. Plaintiffs can win a metro-wide desegregation order only if they prove that racial imbalances in metro-area schools are the result of illegal discriminatory action by either the state or suburban districts. But in the draft rules, the state and suburban districts *voluntarily* assume a legal obligation to ensure racial balance across the metro area, and the need to show discriminatory action drops out of the equation. If racial balance is not achieved in the future, plaintiffs will point to this policy language as proof that they need not allege intentional discrimination to win a metro-wide desegregation order.

(7) Even truly voluntary plans carry risk

A truly voluntary inter-district busing plan -- one containing no mandates, racial quotas or requirements that districts "eliminate segregation to the greatest extent possible" -- would pose far less risk of triggering a successful suit in Minnesota. But states or school districts that choose to adopt voluntary plans must design them with care, so that their provisions do not inadvertently create grounds for future litigation. The case of Milwaukee illustrates the risks that voluntary plans can generate.

In 1975 Milwaukee faced a situation similar to that confronting Minneapolis and St. Paul today. The city's student population was becoming increasingly black and poor, while suburban schools remained largely middle class and white. In response, the Wisconsin Legislature passed a voluntary transfer law, Chapter 220 of the state's education code, which permitted students of different races to transfer between schools in Milwaukee and its suburbs. Under the program, the state paid participating districts full tuition for every student accepted, and also picked up transportation costs. Transfer students were given the same rights and responsibilities as resident students.

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[127]Figures for Milwaukee were obtained in a telephone interview on February 8, 1995 with Betty Nicholas, director of Milwaukee's Chapter 220 program.

[128]Roundtable Discussion Group Final Report, Appendix D, 1-2. The language is the same in the 1995 version of the proposed rules.

By 1984, 1,520 city students were attending suburban schools. However, the Milwaukee School Board and the NAACP claimed that some districts were not accepting all students who wanted to attend, and suggested that they might be "screening out" applicants who had the weakest academic records or other problems. Meanwhile, the number of single-race schools in Milwaukee was increasing.

The Milwaukee School Board and the NAACP brought suit against the State and suburban districts in federal court.[129] David Tatel of Hogan & Hartson served as counsel to the Milwaukee school district. The suit was settled under political pressure. As part of the resulting voluntary "desegregation" plan, more suburban districts agreed to join the Chapter 220 program (currently 23 participate). All participating districts increased their goal for transfer students accepted,[130] and screening was limited.[131] In addition, a coordinating council for the program was set up, and Wisconsin agreed to provide more state money for educational efforts in Milwaukee schools. Currently, about 5,000 black students from Milwaukee attend suburban schools. As previously noted, under 1,000 white suburban students attend special city schools.

The Milwaukee program is very expensive. In 1993-94, Wisconsin provided $92.6 million in Chapter 220 aid to Milwaukee, and also spent $28 million on intra-district busing programs in Beloit and Racine.[132] Of the $92.6 million provided to Milwaukee, approximately $69.5 million was used to support educational programs, while the remaining $23.1 million paid for student transportation. Milwaukee suburban districts received $43 million of the funding for educational programs, and $23.6 million went to the Milwaukee district. As of September 1993, Milwaukee suburban districts' enrollments included 13.4 percent minority students -- more than double the 5.7 percent minority students who reside in those districts.[133]

Milwaukee schools, however, are more heavily minority than ever. Fewer Milwaukee students are attending a school with a minority enrollment of under 70 percent than at any time in the last 15 years. In 1993, 43.2 percent of Milwaukee students were attending such a school, compared to 66.8 percent in 1988. The city's demographics continue to change. The percentage of white students in Milwaukee has declined from 50.6 percent in 1978 to 25.9 percent in 1993, and is expected to decline to less than 20 percent by 1998.

Chapter 220 supporters justify the program's cost by pointing to minority transfer students' test scores. A significant gap remains between the test scores of minority and non-minority students wherever they attend school. However, minority students who transfer from the city to suburban schools do better than those who remain in city schools, as well as those who apply for Chapter 220, but are rejected. Transfer students, however, are a select group: for example, suburban districts are permitted to reject any who have committed an expellable offense or have been truant

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[129]David Tatel described the litigation and its context in "Leading School Attorney Lauds Regional Approach to Student Desegregation Effort," *The School Administrator,* May 1993.

[130]Under the consent decree, suburban districts agreed to particular goals for minority students accepted. For example, one district might have a goal of 20 percent, while another might have a goal of 18 percent, of total student enrollment. Conversation with Betty Nicholas, Director of Chapter 220 program, February 8, 1995.

[131]Students may now be screened out for any of six reasons, among them commission of an expellable offense, truancy of over 20 percent during two consecutive semesters, lack of necessary bilingual programs, lack of sufficient data on the students, etc. Ibid.

[132]Information about the Milwaukee Chapter 220 program was obtained from Wisconsin Legislative Audit Bureau, *An Evaluation of the Chapter 220 Program* (Madison, WI: Legislative Audit Bureau, November 1994). See especially "Audit Summary."

[133]All 23 participating suburban districts are required to provide "multicultural curricula and training in human relations for staff, students and parents." The Audit Summary states that, "Increasing enrollment of resident students in suburban districts may make it difficult to make additional seats available to transfers."

for over 20 percent during two consecutive semesters. Transfer students' superior academic performance is clearly related to the selection process; the link with attendance at suburban schools is more tenuous.

(8) The legal costs argument

Some proponents of the new rules have urged the SBE to adopt a metro-wide desegregation plan to avoid the burdensome costs of defending the suit that may follow rejection of such a plan. But according to Alfred Lindseth, a nationally known school desegregation attorney with the Atlanta firm of Sutherland, Asbill & Brennan, potential defendants often overestimate the costs of defending a desegregation suit. In fact, defense costs in most major desegregation actions vary between $500,000 and $1 million: a small fraction of the costs of court-ordered plans.

Obviously, costs vary with the nature and duration of the legal action.[134] Several years ago, Lindseth defended California in a suit brought by the giant Los Angeles school district and won, at a cost to the state of less than $500,000. When Lindseth defended the Charleston, SC school district in a desegregation suit, costs of winning the unusually lengthy three-month trial were under $1 million.[135] Lindseth enjoyed similar success in the Atlanta metropolitan case (*Armour v. Nix*), the Savannah-Chatham County case, and the Goldsboro, North Carolina cases, none involving fees in excess of $500,000.

The costs of defending metro-wide desegregation cases may be somewhat higher -- perhaps $2 million -- because these cases involve a number of school districts. But the costs of court-ordered plans in such cases are higher too. According to Lindseth, plaintiffs who win desegregation suits against state defendants may obtain what amounts to a blank check. The state of Missouri's plight attests to this. In the St. Louis suit, defendant suburban districts settled out of court, while they were dropped from the Kansas City suit, but in both cases plaintiffs prevailed against the state. Since 1983, Missouri has spent over $2 billion on desegregation efforts in these two school districts. Today, six to eight percent of the state's entire budget, not including regular state aid to education, goes to desegregation aid for St. Louis and Kansas City.[136]

In aberrational cases, legal costs can be higher. According to a recent op-ed piece in *The Wall Street Journal*, legal costs to both plaintiffs and defendants in the Rockford, Illinois school desegregation case currently approach $10 million.[137] Yet the costs of the court-imposed desegregation plan the Rockford school district has resisted dwarf its legal expenses. Since 1989, this city of 140,000 has spent $54 million to implement court-ordered desegregation. By 1996, the city expects to have spent $100 million, and to carry an overall school district debt of more than $150 million.[138] Some desegregation cases seem to have a life of their own; the famous *Brown v. Board of Education* case in Topeka, Kansas remains ongoing after 40 years.

The SBE must take care that the desegregation rules it passes do not increase the chances of success of such a suit. Conceivably, if the rules adopted include provisions that help plaintiffs make their case, Minnesota could find itself paying first for a "voluntary" metro-wide plan, and subsequently financing both a court action and a sweeping plan like those overwhelming Missouri taxpayers.

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[134]At the low end, for example, are unitary status hearings. When Lindseth won unitary status for the Savannah, Georgia school district after 32 years under court order, legal costs were under $150,000.

[135]Conversation with Alfred Lindseth, February 6, 1995.

[136]Ibid.

[137]Michael Warder, "Keep Tax-Happy Judges Away From School Boards," *Wall Street Journal*, December 21, 1994.

[138]Ibid.

CHAPTER IV
Closing the Learning Gap

The proposed desegregation rule would directly affect about half of Minnesota's public school students: The 378,000 who live in the Twin Cities metro area. By contrast, in its 1994 version, the SBE's "learning gap" rule would affect every Minnesota school district with more than 30 minority, students while its 1995 version applies to every district in the state.[1]

The proposed learning gap rule would replace a rule currently on the books, Minn. R. 3535.0200, subp. 2. This rule concerns "equal educational opportunity," which it defines in color-blind terms, as "equal access [for each student] to . . . [the] educational programs . . . essential to his needs and abilities regardless of racial or socioeconomic background."

The proposed learning gap rule also relates to Minnesota school districts' obligation to provide equal educational opportunity. But just as the Desegregation Roundtable altered the common sense meaning of the term "segregation" in its desegregation rule, the proposed learning gap rule radically redefines the concept of "equal educational opportunity."[2]

Rather than assigning schools a legal duty to ensure that students have access to equal opportunities, the proposed rule requires them to ensure that students achieve equal *results*. "Equal educational opportunity," it states, "is fair and equitable access to programs and resources that support *equal educational outcomes* . . . ." "Equal educational outcomes are those educational *results* that demonstrate equal/equitable progress being achieved across racially and economically diverse groups of learners. . . . "[3] [emphasis added]

The Roundtable acknowledges that its newly minted understanding of "equal educational opportunity" will have significant consequences. In its report to the SBE, the Roundtable attempted to justify its position. "This is a new definition of "equal education opportunity," the Roundtable observed. "Opportunity is no longer the key variable. Results are more important . . . . Schools must provide opportunities for learning which will result in the attainment of equal education outcomes for all learners."[4]

The learning gap rule requires schools to ensure "equal educational opportunity" -- i.e., results -- on four broad measures.[5] Schools must "eliminate" the gap for all racial groups on two academic measures: test scores and rates of participation in both remedial and honors courses. And they must do the same on two nonacademic measures: dropout rates and rates of suspension and expulsion. On all these measures, "Equal educational outcomes will be achieved when the gap between learners of color and white learners is not greater than .5 standard deviation in each of the areas identified in this subpart."[6]

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[1]Roundtable Discussion Group Final Report, Appendix D, 7; "Revised Recommendations from the Roundtable Discussion Group," February 13, 1995, 7. A list of districts affected by the 1994 rule appears in Appendix E of the Roundtable Discussion Group Final Report.

[2]What follows concerns the 1994 version of the learning gap rule. The 1995 version, though partially formulated, remains unfinished, according to Robert Miller, director of the Office of Desegregation/Integration. The 1995 version defines "equal educational opportunity" as follows: "Equal educational opportunity is fair and equitable access to programs and resources that support equal educational achievement. . . . Equal educational achievement results when equitable progress is being achieved across racially and economically diverse groups of learners."

[3]Roundtable Discussion Group Final Report, Appendix D, 3.

[4]Roundtable Discussion Group Final Report, iii.

[5]Ibid.

[6]Roundtable Discussion Group Final Report, Appendix D, 3.

The draft rules impose severe penalties on schools that fail to close the racial gap on these four measures. A school that fails within four years to "reduce the performance gap as required" will have its schools "reconstituted."[7] The rules define a reconstituted school as "a school site whose staff is reassigned to other schools within the district because the learners of that site have not made adequate progress toward reducing the gaps for learners of color . . . ."[8] If the Commissioner of Education issues a reconstitution directive and the SBE upholds it, "the school site must be reconstituted by the beginning of the next school year."[9]

The penalty for persistent failure to close the gap is more severe -- loss of autonomy and democratic control. The draft rules direct that, "By the end of three years following being reconstituted, if the school site has not achieved the goals . . . for closing the gap, the *State Board will assume the responsibility* of the education of the children at the site and develop a plan for equitable educational outcomes of those students [italics added]."[10]

(1) The SBE's heavy burden of proof

The *Star Tribune* has rightly called the proposed learning gap rule "revolutionary."[11] If adopted, the rule may well be unique in the nation. The new rule's redefinition of "equal opportunity" -- like the desegregation rule's redefinition of "segregation" -- would facilitate a vast expansion of state control over education, correspondingly diminishing the control exercised by local school personnel, taxpayers and families. It would permit the state to inject race into nearly every policy and curriculum decision that schools make -- a move likely to prove both expensive and divisive.

In enacting a measure with such far-reaching implications, the SBE bears a heavy burden of proof. It must demonstrate to Minnesotans that it has carefully assessed the nature and causes of the racial learning gap. If closing the gap is to become a legal obligation, the SBE must convince school officials, families and taxpayers that the gap *can* be closed under current conditions, and that we know how to do it. Penalties for failing to close the gap must be perceived as fair. In addition, the SBE must demonstrate that expenditures to close the gap will in fact accomplish their goal: Boosting minority achievement, and reducing social pathologies like high dropout rates.

Finally, the SBE must recognize that good intentions are not sufficient justification for a "revolutionary" rule of this sort. The Board must convince Minnesotans that the rule is unlikely to generate harmful unintended consequences of the sort that often plague large-scale experiments in social engineering.

Unfortunately, thus far the SBE does not seem to have met this heavy burden of proof. It has neither provided much information about the steps it believes will close the learning gap, nor

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[7]Ibid., 16. Specifically, the rule provides that if "a district fails to reduce the performance gap as required . . . after a three year period . . . the commissioner shall provide assistance to the site. . . . Within one year after receiving technical assistance and revising the plan, if the site is still in noncompliance, the commissioner shall direct that the site be reconstituted."

[8]Roundtable Discussion Group Final Report, Appendix D, p. 4. The 1995 version of the rules defines a "reconstituted school site" as "a school site whose staff is dissolved because the learners of that site have not made adequate progress toward reducing the gaps for learners of color. . . ." "Revised Recommendations from the Roundtable Discussion Group," 4.

[9]Ibid., 16. The 1995 version of the rules does not contain this provision. The 1995 version states: "Within one year after receiving technical assistance and revising the plan, if the site is still in noncompliance the commissioner may direct the local board of education to reconstitute the school site." "Revised Recommendations from the Roundtable Discussion Group," 17.

[10]Ibid. The 1995 version of the rules does not contain this provision.

[11]"Desegregation: Policy Changes Eclipsed by Demographics," *Star Tribune*, January 15, 1995.

specified why it expects these steps to be effective. Moreover, the Board has not answered the following objection, which many Minnesotans are likely to raise: If state officials know better than local school personnel how to reduce racial disparities, they should share their knowledge with school officials now. If they do not have such knowledge, they should not impose a legal requirement to close the gap on Minnesota schools, nor should they impose strict timetables or severe penalties on schools that fail.

In fact, the SBE appears to have endorsed the Roundtable's learning gap rule -- and the Legislature to have passed broad enabling legislation -- without scrutinizing the nature and extent of the learning gap itself. Neither the SBE nor the Legislature seems to have reviewed the success of efforts to diminish the gap by other districts around the country. The following analysis will attempt, in brief fashion, to examine these subjects. In addition, it will consider the likely consequences and costs of enforcing a learning gap rule here in Minnesota.

(2) The nature of the learning gap

a. The national gap

A sizable racial gap in academic performance has existed since national statistics were first compiled. The gap was evident in 1971, when the National Assessment of Educational Progress (NAEP), under the auspices of the U.S. Department of Education's National Center for Education Statistics, began tracking the achievement of large samples of students representative of the total U.S. student population. In the last 20 years, black students have nearly halved the black-white achievement gap. But a significant gap persists.

The NAEP data provide the best measure of the nature and extent of the current black-white achievement gap. Using 1990 NAEP data, Abigail Thernstrom, Senior Fellow at the Manhattan Institute and co-author with Stephan Thernstrom of *America in Black and White*, a forthcoming book on the changing status of black Americans, has described the gap as follows:

> At every age level, black students today lag far behind their white peers in the most important subjects that have been tested by the National Assessment of Educational Progress. The 1990 data indicate that in reading, for example, black 13-year-olds, typically in the eighth grade, are about as adept at handling written material as whites who are almost two -- 1.8 -- years younger. By the age of 17, the gap has widened to 3.4 years, so that on reading tests, black students about to graduate from high school score only a few points ahead of whites in the eighth grade. In fact, it is clear that a very large and troubling difference in reading competence is present not long after children first start school and that the gap does not diminish notably with prolonged exposure to the educational system.
>
> The results of the assessment of mathematics skills are much the same. But if the disparities in reading and mathematical competence seem shockingly large, they are modest in comparison with the immense racial gap in science and writing. In science, blacks in their final year of high school demonstrate much less command of the subject than whites back in the eighth grade. Even greater disparities show up on tests of writing skills. Here blacks in the eleventh grade perform just a few points ahead of whites in grade four.[12]

According to Thernstrom, however, the NAEP results hold "good news" as well. The racial gap

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[12]Abigail Thernstrom, "The Drive for Racially Inclusive Schools," *Annals, AAPSS*, 523, September 1992, 133. Thernstrom credits Stephan Thernstrom with performing the statistical work on student achievement included in her article.

in reading and math proficiency used to be far greater than it is now:

> The first tests by the NAEP in 1971 showed blacks to be 3.3 years behind whites in reading at age 13, and fully 6.0 years behind at age 17. This gap has narrowed almost by half by 1990. In mathematics, the picture is similar. In science, though, there appears to have been far less progress. Black 17-year-olds were 7 years behind whites in 1969 and almost 6 today.[13]

The racial gap narrowed between 1971 and 1990 both because black students made significant progress, and because white students' scores generally stagnated during that period.[14] Had white students continued to improve their scores as black students did, the racial gap today would resemble that of 20 years ago.

Unfortunately, the 1990-'92 NAEP data, the most recent available, indicate that the racial gap may again be widening. Scores for black 17 year olds fell in most subject areas between 1990 and 1992. Black reading scores declined from 267 to 261, while whites held steady at 297.[15] Black writing scores fell from 268 to 263, while whites increased from 293 to 294.[16] Black math scores declined from 288 to 286, while white scores increased from 310 to 312.[17] Black 17-year-olds did improve in science, increasing from 253 to 256. But their white counterparts also posted a 3-point gain, moving from 301 to 304.[18]

b. The Minnesota gap

Minneapolis and St. Paul have attempted to close the racial learning gap in their schools for at least 20 years. Both districts have made busing for "racial balance" the centerpiece of their efforts. But they also have engaged in extensive and costly efforts of other kinds. These have ranged from strenuous attempts to hire minority teachers and staff, to the adoption of "multicultural" curricula, to remedial education and policies promoting smaller class sizes.

Yet despite all this effort and expense, the learning gap in both districts has remained stubbornly persistent. Today, on average, black students in Minneapolis perform 20 points below white students on standardized tests.[19] A recent report of the St. Paul Blue Ribbon Commission on Diversity and Equity observed that "students of color consistently have low academic performance," and called minority dropout and truancy rates in that city "horrifying"[20]

Unfortunately, the racial learning gap in Minneapolis appears to be widening, just as the national gap is. Over the last five years, test scores of black second and sixth graders in the district have

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[13]Ibid.

[14]David J. Armor, "Why Is Black Educational Achievement Rising?" *The Public Interest*, Summer 1992, 66.

[15]Ina V.S. Mullis, John A. Dossey, Jay R. Campbell, Claudia A. Gentile, Christine O'Sullivan and Andrew S. Latham, "NAEP 1992 Trends in Academic Progress" (Washington, D.C., National Center for Education Statistics, July 1994), 137.

[16]Ibid., 195.

[17]Ibid., 80.

[18]Ibid., 37.

[19]Laurie Blake, "Most Minneapolis Grade Schools Lagging," *Star Tribune*, November 16, 1994. As noted, on a normal curve equivalent scale of 100, the test's mean is 50 and the standard deviation is 20. Basically, black students perform one standard deviation below white students.

[20]The Blue Ribbon Commission on Diversity and Equity, "Report to the Superintendent of the Saint Paul Public Schools" (St. Paul Public Schools, May 4, 1994), letter to Curman Gaines and p. a of Executive Summary.

dropped steadily, while whites have generally improved slightly.[21]

The racial gap on nonacademic measures such as dropout and discipline rates also remains significant. The dropout rate for black students in Minneapolis is about 75 percent higher than the rate for white students.[22] In St. Paul, the overall dropout rate for 1991-'92 was approximately 11 percent. For black and Hispanic students, however, the rate was about 18 percent, while for white students, it was 9 percent. Asian students, at 8 percent, had the lowest dropout rate, while American Indian students, at 26 percent, had the highest.[23]

Racial differentials on suspension and expulsion rates are similar. In 1992-'93, 61.4 percent of students suspended in Minneapolis were black, though black students comprised only 35.3 percent of the student body. White students -- 43.4 percent of total enrollment -- made up 24.8 percent of suspended students. On the other hand, Hispanic-American students, at 2.8 percent of total enrollment, represented 2.3 percent of students suspended, and Asian-American students, at 9.9 percent, made up only 3.4 percent of those suspended.[24] At North High School, which at 61.5 percent had the highest black population of Minneapolis high schools, 41 percent of the entire student body was suspended during the 1992-'93 school year. Conversely at Southwest High School, which had 10.1 percent black students -- the city's lowest percentage -- only 16.7 percent of the student body was suspended.[25] St. Paul also has significant differentials in racial suspension rates.[26]

Why have Minneapolis' and St. Paul's vigorous efforts to close the learning gap failed so resoundingly? The research review that follows suggests they have failed because the gap seems largely to be a function of socioeconomic factors beyond schools' control.

For decades, the factors most closely correlated with student academic achievement have been socioeconomic factors such as parental educational attainment, income and job status.[27]

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[21]Noting that the national median is the 50th percentile, from 1989 to 1994, black second graders fell from 21 to 17 in reading vocabulary, from 24 to 16 in reading comprehension, and from 35 to 31 in math computation (this decrease came in the final year, after scores had held steady for 4 years). Math concepts scores, at about 33, did not change over this period. During the same period, white second graders' scores increased from 59 to 60 in reading vocabulary, held steady at 56 in reading comprehension and 67 in math computation, and increased from 70 to 75 in math concepts. Asian second-graders increased from 50 to 52 in reading vocabulary, held steady at 54 in reading comprehension, increased from 60 to 63 in math computation, and increased from 64 to 70 in math concepts.

Over the same period, black sixth graders fell from 26 to 23 in reading vocabulary, from 36 to 31 in reading comprehension, from 41 to 33 in math computation, and from 41 to 33 in math concepts. White sixth graders increased from 63 to 65 in reading vocabulary, held steady at 67 in reading comprehension, fell from 64 to 61 in math computation, and increased from 76 to 78 in math concepts. Asian sixth-graders increased from 35 to 42 in reading vocabulary and from 50 to 57 in reading comprehension, dropped from 75 to 68 in math computation, and held steady at 72 in math concepts. *Minneapolis Districtwide Student Achievement Test Results in Spring 1994*, Tables 18 and 21.

[22]Minneapolis Public Schools Student Accounting Office, 1993-94 Dropout Statistics.

[23]Debra O'Connor, "Metropolitan Desegregation Plan Seeks to Bridge the 'Learning Gap,' *Pioneer Press*, April 10, 1994.

[24]Wayne Washington, "Disparity Evident in Suspensions of Black Students," *Star Tribune*, May 17, 1994.

[25]Ibid.

[26]St. Paul records suspension incidences, rather than numbers of individual students suspended. In 1993-'94, St. Paul reported 3,847 incidences of suspension. Fifty-eight were American Indians, 193 were Hispanic-Americans, 366 were Asian-Americans, 1,719 were African-Americans, and 1,511 were white. Out of a total enrollment of 39,294, 1.4 percent were American Indians, 4.9 percent were Hispanic-Americans, 19.2 percent were African-Americans, 22.7 percent were Asian-Americans, and 50.7 percent were White Americans. Conversation with Cheryl Marty, Communications Officer, St. Paul Public Schools, March 9, 1995.

[27]"Why Is Black Educational Achievement Rising?" 77. See David Grissmer, Sheila Nataraj Kirby, Mark Berends, Shephanie Williamson, *Student Achievement and the Changing American Family* (Santa Monica, CA: Rand,

Unfortunately, many minority students labor under significant disadvantages in these respects.

When mandatory busing began in Minneapolis in 1974, the out-of-wedlock birth rate among the district's black residents was 54.4 percent. Among whites, the figure was 17 percent. In 1993, 78.8 percent of the city's black babies were born out of wedlock, while 30.5 percent of white babies started life that way.[28] Parents of children born outside of marriage often have little education themselves, low incomes, and low job status. Their children, in turn, are at higher-than-usual risk for poor academic performance, criminal activity and a host of other social pathologies. So long as social problems of this magnitude disproportionately affect minority students, the learning gap is likely to persist.

(3) Research on measures designed to close the learning gap

Social scientists have been assessing the effectiveness of measures aimed at improving minority academic achievement for 30 years. The subject is highly controversial, and presents significant methodological problems.[29] Yet the repeated failure of policies that seek to boost minority performance by creating "racially balanced" schools has led a growing number of social scientists to challenge the "harm-benefit thesis" which the *Brown* court embraced. Increasingly, the idea that "racial balance" significantly benefits the social and academic development of minority children has come under fire.

The research review that follows is not intended to be exhaustive. It is, however, intended to present important information that seems to have been overlooked thus far in Minnesota in the policy-making process.

From the beginning, the effort to improve Minnesota minority students' school performance has placed racial balance, or "desegregation," at the center of the equation.[30] The effort began in 1972 with the 15-percent rule, which (given demographics at that time) required race-based busing in Minneapolis, St. Paul and Duluth. It broadened in 1987, when the MDE and St. Paul superintendent David Bennett began to devise ways to move students of different races across city-suburban lines. The Desegregation Roundtable -- convened to consider changes to the 15-percent rule -- greatly expanded this focus by drafting a "Desegregation/Integration" rule that extended racial ceilings and floors to all school districts in the Twin Cities metro area.

Since 1972, advocates of race-based busing have suggested that the practice benefits children -- particularly minority children -- in a variety of ways. Some, like former Minneapolis superintendent Robert Ferrera, have insisted that "desegregation/integration is important . . . for the increased academic success of all students."[31] Generally, such claims have been based in part on the belief that moving poor minority students to predominantly white schools leads these children to adopt "middle-class values" important for academic success. Advocates have also claimed that busing for racial balance improves "multicultural understanding" and race relations.[32] Finally, they have suggested that busing produces long-term benefits, such as increased likelihood

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1994), 105-106. According to this report, "Other things equal, higher levels of parental education and family income are associated with significantly higher test scores. Smaller family size and older mothers also are associated with higher test scores."

[28]During the period in question, a change was made in the method of calculating the race of children born out of wedlock. In 1974, the race of both parents was taken into account. In 1993, the child's race was determined by the mother's race alone. Conversation with Shel Sweeney, Minneapolis Department of Health, February 6, 1995.

[29]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[30]Council of Metropolitan Area Leagues of Women Voters, 5-17.

[31]Council of Metropolitan Area Leagues of Women Voters, 5-6.

[32]Ibid.

that minority children will choose "desegregated" colleges and workplaces.[33]

In *Forced Justice*, David Armor reviews social science research from the last three decades on busing's effectiveness in all these respects. The following analysis is drawn, in part, from his work. As will be seen, the literature throws serious doubt on whether busing actually produces significant gains for minority children, and whether, in light of disappointing results, its costs -- either in terms of tax dollars or community cohesion -- can be justified.

a. Racial balance and academic achievement

Only a few competent studies seem to show that busing for racial balance improves minority academic achievement.[34] On the other hand, according to Armor, "Numerous studies fail to find a strong association between desegregation and black achievement."[35] Two of the most complete analyses of the effects of busing -- the National Institute of Education's comprehensive literature review and the NAEP data -- suggest that, from a cost-benefit perspective, busing to achieve racial balance is not an effective way to raise minority achievement.

In 1984, the National Institute of Education, then the research arm of the U.S. Department of Education, published a comprehensive review of the relationship between racial balance and black achievement. To ensure objective analysis, NIE brought together six recognized experts in the field, including Armor, along with Thomas Cook, a referee well-known in evaluation methodology.[36]

The NIE panel selected the 19 most rigorous studies, including 35 analyses of separate grades. Study results varied considerably. Each panelist conducted his own analyses of these studies, and wrote a report setting forth his conclusions. Cook then wrote a synthesis of the six experts' papers.

Based on the panel's work, Cook concluded that: (1) busing did not raise black achievement in mathematics; and (2) busing raised black achievement in reading, but only by a small amount (the equivalent of between two to six weeks of the normal gains of one year).[37] Robert Crain, who rejected the methodology adopted by the panel for selecting the most rigorous studies, was the only panelist who found larger effects for reading.[38]

The variability of study results should give pause to education policy makers who are considering race-based busing plans to boost black achievement. Though some individual studies show significant gains in black reading skills, slightly more than half actually show either no effect or negative effects.[39] The NIE review, then, suggests that policy makers cannot be confident that a

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[33]Ibid.

[34]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[35]David J. Armor, "Why Is Black Educational Achievement Rising?" *The Public Interest*, Summer 1992, 72.

[36]Thomas Cook, et al., "What Have Children Learned from School Integration?" *School Desegregation and Black Achievement* (National Institute of Education, 1984).

[37]Ibid., 40-41.

[38]Ibid.

[39]Commenting on this variability, Cook noted that "studies with the largest reading gains can be tentatively characterized . . . [as having] small sample sizes . . . two or more years of desegregation, desegregated children who outperformed their segregated counterparts even before desegregation began, and desegregation that occurred earlier in time, involved younger students, was voluntary, had larger percentages of whites per school, and was associated with enrichment programs. None of the above factors can be isolated, singly or in combination, as causes of any of the atypically large achievement gains." Ibid.

busing policy by itself has a high likelihood of increasing minority achievement.[40]

As previously noted, the National Assessment of Educational Progress has been collecting academic achievement data on large national samples of students since the early 1970s. NAEP assesses trends in reading and mathematics performance for children ages 9, 13, and 17. Given its comprehensive nature and the length of time over which it has been gathered, the NAEP data are the best available for examining the overall trends and differences between black and white achievement since wide-scale busing began. [41]

NAEP data clearly do not support the thesis that race-based busing leads to black achievement gains.[42] Though black students have halved the achievement gap in the last 20 years, both the timing of black gains and the nature of their distribution suggest that busing has not played a large part.[43]

Most of the increase in school desegregation occurred between 1968 and 1972. Much less occurred after 1972, when busing became increasingly controversial and the Supreme Court limited the legal requirements for desegregation between central cities and their suburbs. After 1980, few comprehensive desegregation plans were initiated, and some mandatory busing plans were abandoned. But the trend in school desegregation does not match the black achievement trend, which showed gains in the 1980s as large as those registered in the 1970s.[44]

It is particularly enlightening to compare NAEP's achievement trends for black students in predominantly black, versus racially balanced schools. If racial balance contributes significantly to black achievement, black students in majority white schools should show greater gains than their counterparts in "segregated" schools. But NAEP data for 1975 to 1988 -- when the largest black gains occurred -- show black students in majority black schools making gains as large or larger than those of blacks in majority white schools.[45] Likewise, the data show blacks in disadvantaged urban communities gaining as much as blacks in nondisadvantaged communities.[46]

Specifically, NAEP finds that, while blacks in majority white schools generally score somewhat higher than blacks in majority black schools, between 1975 and 1988, 13-year-old black students in majority black schools made reading gains virtually identical to those of blacks in majority white schools.[47] Math trends for the years 1978 to 1990 show that black 13-year-olds in majority black schools actually gained 10 points *more* than blacks in majority white schools.[48]

Data for other age groups show a similar pattern. Black 9-year-olds in majority black schools gained 12 points in reading and 17 points in math. Their counterparts in majority white schools gained 11 points in reading and 16 points in math. A more marked difference appeared for 17-year-olds. Black 17-year-olds in majority black schools gained 34 points in reading and 22 points in math, while their counterparts in majority white schools gained only 21 and 17 points respectively. [49] By 1990, only a few points separated black 9-year-olds in majority white and

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[40]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.
[41]"Why Is Black Educational Achievement Rising? 71-75.
[42]Ibid., 73.
[43]Ibid., 72-75.
[44]Ibid., 72.
[45]Ibid., 73-74.
[46]Ibid., 74.
[47]Ibid.
[48]Ibid.
[49]Ibid.

majority black schools, and there was virtually no difference for black 17-year-olds.[50] NAEP data clearly suggest that school desegregation has not been a significant factor in national black achievement gains.

b. New Castle County, Delaware: A case study

Comprehensive analysis of national data is very useful in assessing the effect of racially balanced schools on black achievement. But case studies also provide an important perspective. Armor, in a 1994 study,[51] reported on black-white educational outcomes in New Castle County, Delaware, following a dozen years (1981-'93) in which the four districts in that county were unusually successful in maintaining prescribed racial balances in their schools. More specifically, most schools consistently stayed within a range of 10 percent of having "too many" or "too few" black or white children -- an even more demanding standard, in other words, than Minnesota's 15-percent rule.

"New Castle districts," Armor writes, "are among the most desegregated (in terms of racial balance) districts in the nation," adding that Gary Orfield himself has characterized the New Castle plans as "virtually eliminat[ing] segregated education" in the Wilmington area.[52]

Nonetheless, and focusing on achievement scores and dropout rates for New Castle County students for the 1991-'92 school year, Armor found large differences between white and black children. "The standardized achievement testing program," Armor writes, "conducted for all four school districts show consistent differences in achievement at all test grade levels and for both reading and mathematics achievement."[53] For example, mean reading scores for white sixth graders on the Stanford Achievement Test was about 56; it was about 39 for black sixth graders. White eighth graders averaged 54 in math; black eighth graders averaged 38.

Why these sizable gaps? Using regression analysis, Armor argues: "The most important conclusion is that the observed differences between black and white achievement derive not from school programs or policies but rather from the socioeconomic conditions found in their families and neighborhoods."[54]

For instance, Armor reports that only about 3 percent of white sixth graders in the county come from families on AFDC, compared to 23 percent of black sixth graders. Likewise 14 percent of white students in the county come from single-parent homes, whereas the figure is 54 percent for black youngsters. Armor calculates that differences in socioeconomic status can explain about 86 percent of the gap between white and black sixth graders in math. He sums up:

> [T]he analysis of achievement test scores and dropout rate[s] fails to offer any support to the thesis that racial differences are attributable to the former segregated system [in New Castle County], or that they are caused by current school program deficiencies. The achievement gaps persist in spite of the existence of highly desegregated school systems that have maintained racial balance for 15 years. More important, nearly all of the black-white gap in 6th and 8th grade achievement can be explained by SES factors and 1st grade scores, and the dropout gap can b explained by SES factors and 8th grade test scores. In view of these findings,

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[50]Ibid., 74-75.

[51]David J. Armor, "Evaluation of Desegregation in New Castle County," November 28, 1994.

[52]Ibid., 12-13.

[53]Ibid., 21.

[54]Ibid., 30.

confirmed by research in other cities and by other national studies, it is untenable to argue that the achievement gaps in New Castle County are vestiges of the former dual school system.[55]

c. The 1991 DeKalb Statement

In the 1960s and '70s, when large-scale busing programs were getting underway, most social scientists believed that busing for racial balance was the key to raising black achievement. Today, though many scholars continue to hold this view, most now state it in heavily qualified terms. Given the highly variable outcomes revealed by research reviews -- including many studies which fail to show any benefits -- social scientists who find positive outcomes from busing tend to focus on the conditions under which such outcomes can occur.[56]

The best example of this newly constrained view is the "DeKalb Statement," a document signed by 52 social scientists and submitted with an *amicus curiae* brief in the 1991 *Pitts* case on behalf of the NAACP and other plaintiffs.[57] The Harvard Project on School Desegregation's Gary Orfield, a primary consultant to the Minnesota Desegregation Roundtable, was among the most prominent signers.

The DeKalb Statement claimed that busing produces several general benefits, though it acknowledged only a few studies that reached contradictory conclusions.[58] But the statement also declared that "assigning minority and white students to the same school is no panacea . . . ."[59] "[M]erely placing black and white children together in schools . . . does not achieve these goals."[60] Significantly, even if busing produced the strongest possible effects cited in the DeKalb statement, it would account for only a small fraction of the black gains shown in the NAEP.[61]

Nearly half the DeKalb Statement is devoted to specifying the "conditions of successful desegregation." The signers set forth three general conditions: "(1) desegregate as many grades as possible at the same time, concentrating especially on the youngest students, (2) cover as large a geographic area as possible to include a broad spectrum of socio-economic classes as well as races, and (3) persevere with the long-range goal of desegregation, despite opposition."[62]

The statement also indicated that certain in-school conditions must exist if the potential benefits of busing are to be realized. Among these are structured cooperative learning strategies, parental involvement, utilization of multi-ethnic textbooks, elimination of ability grouping and tracking (which can lead to resegregation in the classroom), avoidance of discipline for "cultural differences," recruiting "substantial" numbers of minority teachers and administrators, and teacher support for the busing plan.[63]

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[55]Ibid., 34-35.

[56]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[57]"School Desegregation: A Social Science Statement," in Brief of the NAACP, et al., as Amicus Curiae in support of respondents, *Freeman v. Pitts*, U.S. Supreme Court on Writ of Certiorari to the U.S. Court of Appeals for the 11th Circuit, June 21, 1991.

[58]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[59]"School Desegregation: A Social Science Statement," 14a.

[60]Ibid.

[61]Why Is Black Educational Achievement Rising?", 72.

[62]"School Desegregation: A Social Science Statement," 14a.

[63]In *Forced Justice*, Armor observes that federal case law does not provide a precedent for ordering desegregation plans that do more than accomplish the six *Green* factors, which include student assignment facilities, transportation, extracurricular activities, and faculty and staff hiring and assignment. Yet the DeKalb statement suggests that many

The DeKalb Statement represents a major departure from earlier versions of the harm-benefit thesis. It amounts to a concession by busing advocates that a busing program's success depends on fulfillment of a number of conditions, some of which are beyond the control of school authorities.[64] Significantly, the Supreme Court has given little judicial note to the statement or the research on which it was based.[65] As Armor has pointed out, the DeKalb Statement undermines the moral authority of the harm-benefit thesis by raising the possibility that, if certain conditions are not met, busing will fail to deliver promised benefits.[66]

Twin Cities school superintendents who endorsed metro-wide busing probably did not know that experts like Gary Orfield now believe that busing plans may fail unless certain restrictive conditions exist. In fact, if the Roundtable's plan is adopted, a number of the DeKalb conditions may not materialize. Many Twin Cities parents are likely to oppose metro-wide busing, as parental support typically declines with the distance children are bused.[67] Likewise, suburban districts may find it difficult, if not impossible, to recruit "substantial" numbers of minority teachers and administrators. The availability of minority teachers, especially in science and math, is declining, and Minneapolis and St. Paul schools have been trying to increase minority personnel for years, with disappointing results.[68] Clearly, if the plan reassigns teachers for racial balance or "reconstitution" purposes, teacher support will be problematic.

Likewise, superintendents who supported the Roundtable plan probably did not realize that their classrooms may have to change substantially once minority transfers arrive. Discipline standards may have to be altered, new "multi-ethnic textbooks" purchased, and new "cooperative learning strategies" adopted. The DeKalb statement indicates that the youngest students -- kindergartners and first graders who can least tolerate a long bus ride -- should be the primary focus of a busing plan. Yet if a metro-wide plan is truly voluntary, parents will be very reluctant to let such young children participate. Unfortunately, neither the SBE nor the Roundtable has made clear the extensive changes required -- even in the opinion of busing advocates -- if a metro-wide desegregation plan is to have a chance at raising minority achievement.

d. The Minnesota challenge

David Armor visited the Twin Cities, in June 1994, to address a Center of the American Experiment Luncheon Forum and speak at a roundtable with legislators, school superintendents, and members of the SBE. In response to his visit, the Minneapolis school district produced three articles suggesting that busing raises black achievement. Armor commented on each of these.

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factors beyond those set forth in *Green* must be in place before positive outcomes from desegregation plans are assured. One of these factors is the eradication of tracking or grouping students by ability levels. In fact, the Eleventh Circuit has held that tracking is not unconstitutional, even if it contributes to racial imbalance in classrooms. *Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[64]Ibid.

[65]"Why Is Black Educational Achievement Rising?" 71. This stands in stark contrast to the great weight accorded a similar statement signed many years earlier by 32 social scientists in *Brown v. Board of Education*.

[66]Ibid.

[67]Of course, if the plan remains voluntary, parental support will not be an issue, since parents who use the plan will obviously support it.

[68]Bob Hotakainen, "Incentives Urged to Attract Minority Teachers to State," *Star Tribune* , August 14, 1991. Despite the efforts of many years, today 15 percent of Minneapolis teachers and 11 percent of St. Paul teachers are members of minority groups. Wayne Washington, "Disparity Evident in Suspensions of Black Students," *Star Tribune*, May 17, 1994.

The first article was a literature review by Jomills Braddock and James McPartland.[69] In his response, Armor pointed out this review's limitations: "Like much of the writing in this field, [the Braddock and McPartland article does] not cite or discuss any contrary conclusions. The only original research cited that specifically studied the relationship between desegregation and black academic achievement is that by Robert Crain, which is one of the few competent studies that finds academic benefits from desegregation."

The second article, by Judith Anderson,[70] supported a central thesis of the Roundtable's draft rules: That concentration of poverty in a school causes an independent, adverse effect above and beyond that caused by students' individual poverty. In response, Armor observed, "I do not doubt that there is some small effect due to changing one's environment, but when the analysis is done properly using statistical regression methods (which was not done by Ms. Anderson), the usual finding is that the effect of school poverty is very small compared to the effect of one's family poverty. Moreover, similar modest benefits are found for compensatory education, which raises the cost-benefit question: It may be more cost-effective to improve programs in inner-city schools than to simply transfer high-poverty children to low-poverty schools."

The last article, by Christina Meldrum and Susan Eaton,[71] criticized Armor's Norfolk research. Armor noted that:

> There are so many methodological problems with this paper (as there are with many papers produced by the Harvard Project on School Desegregation) that I hesitate even to comment on it. Their analysis of black achievement is especially flawed: (1) They fail to compare black achievement in segregated and desegregated schools; (2) they cite another study that analyzes test scores for only one year after returning to neighborhood schools; and (3) they claim that the original desegregation plan benefited black achievement, when in fact it *fell* after desegregation and did not even reach the pre-busing levels until eight years after the start of desegregation! . . . The report misses the essence of the argument, that mandatory busing causes white flight and that ending busing can actually produce a return of the fleeing whites.[72]

e. Remedial efforts as components of desegregation plans

Increasingly, advocates of metro-wide busing have had to confront busing's failure to improve minority achievement as hoped, both nationally and in the Twin Cities. In response, some have claimed that busing has failed because it has focused on moving bodies, without attempting to remedy learning differentials. Metro-wide busing can succeed here, they suggest, if a learning gap component is added to attempts to achieve racial balance.[73]

In fact, school desegregation orders have required school districts to do much more than move

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[69]Jomills Henry Braddock II and James M. McPartland, "The Social and Academic Consequences of School Desegregation," *Equity and Choice*, February 1988.

[70]Judith Anderson, Debra Hollinger, and Joseph Conalty, "Re-examining the Relationship Between School Poverty and Student Achievement," *ERS Spectrum*, Spring 1993.

[71]Christina Meldrum and Susan E. Eaton, "*Resegregation in Norfolk, Virginia: Does Restoring Neighborhood Schools Work?*" (Cambridge, MA: The Harvard Project on School Desegregation, May 1994).

[72]All these articles and Dr. Armor's complete response may be obtained through Center of the American Experiment.

[73]This was a particular focus of keynote speaker Leonard Stevens' address at the December 2, 1994 Hamline University seminar, "Metropolitan Desegregation: Should Minnesota Bus Students or Change Housing Patterns?".

bodies for 25 years. In 1968, the Supreme Court ruled in *Green v. New Kent County*[74] that desegregation remedies must deal with all aspects of school operations, not simply with student assignment. The Court stated that a complete remedy must address six factors, including hiring and assignment of faculty and staff, equity of facilities, and nondiscrimination in transportation and extracurricular activities. The Court went farther in the 1977 *Milliken II* case, approving court-ordered "remedial or compensatory" programs to alleviate what it saw as the effects of "racial isolation" on minority children.[75]

In a monograph entitled, "The Responsibility of State Officials to Desegregate Urban Public Schools," Hogan & Hartson attorneys described how extensive remedial efforts have been since *Milliken II*:

> In the last decade, compensatory and remedial education programs have been included as components of desegregation plans throughout the country, many of them based on remedial plans proposed by local school boards, including in such major cities as Chicago, Dallas, Indianapolis, Nashville, Wilmington, Cleveland, Buffalo, St. Louis and Kansas City. Among the programs that have gained particular attention in these cities because of their potential for improving the quality of education in schools still suffering from vestiges of segregation are the following: capital improvements, to renovate existing facilities and construct new ones; "effective schools" programs, to increase student achievement; general class size reductions; early childhood programs; remedial reading and communication skills programs; general curriculum development; student testing; counseling and career guidance; staff development programs; student behavior programs; and parent involvement and school/community relations programs.[76]

This process reached its zenith with the *Jenkins* case, involving the Kansas City schools. In that case, the court ordered a near doubling of education-related spending; instituted comprehensive remedial programs; mandated that nearly every middle school and high school, and half of all elementary schools, become specialized magnets; established a voluntary busing program with suburban schools for racial balance; and even required that every school be made "visually pleasing." Test scores, however, have not risen significantly.

Unfortunately, even busing plans that have attempted -- at great expense -- to ensure academic improvement and equity in all aspects of student life have failed to meet advocates' expectations. Minnesotans should be wary of claims that a new commitment to "closing the learning gap" will render metro-wide busing effective here.

(4) Other Claimed Benefits

Supporters of metro-wide busing often claim that busing for racial balance yields benefits beyond academic improvement. In its report entitled "Metropolitan School Desegregation and Integration," for example, the Council of Metropolitan Area Leagues of Women Voters asserts that busing leads to enhanced minority self-esteem, better race relations, and benefits in long-term outcomes such as educational and occupational attainment. Yet, with some exceptions, research on these subjects offers no more support for the harm-benefit thesis than research on achievement. Indeed, in some

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[74]430 US 391 (1968).

[75]*Milliken v. Bradley*, 433 U.S. 267, 272 (1977) ("*Milliken II*").

[76]David S. Tatel, Maree F. Sneed, Kevin J. Lanigan, and Steven J. Routh, "*The Responsibility of State Officials to Desegregate Urban Public Schools*" (Prepared for the National School Desegregation Project, University of Chicago (undated)), 26.

cases the evidence has been more negative than positive.[77]

a. Self-esteem

"Self-esteem" is a dubious concept. However, many social scientists regard it as important, and it was a central concern of the Supreme Court in *Brown v. Board of Education.*

In fact, two research reviews comparing the "self-esteem" of black and white students have shown that black students tend to have higher "self-esteem" than white students, regardless of whether they attend a racially mixed or largely black school. Reviews carried out between 1963 and 1970 by Rosenberg and Simmons,[78] and between 1967 and 1977 by Porter and Washington,[79] included 35 independent studies altogether. Most of these studies found that black "self-esteem" was either higher than or equal to white "self-esteem;" only seven showed that black "self-esteem" was lower than white "self-esteem." [80]

Researchers have also compared the "self-esteem" of black students who attend racially mixed schools with that of counterparts attending predominantly black schools. For example, of almost 50 studies of desegregation and black "self-esteem" reviewed by St. John[81] and Stephan,[82] only six found consistently positive effects. Seventeen studies, on the other hand, found that school desegregation has negative effects on black "self-esteem."[83] This may not be surprising. As black leaders have sometimes noted, the lesson of busing for black students may often be, "You can't do anything on your own. To accomplish much, you need to sit next to white students."

b. Race relations

Perhaps the most frequently heard defense of busing is that it improves race relations and racial understanding, and prepares children to live in a "multicultural" world.[84] Indeed, as Armor points out, the critical assumption behind the harm-benefit thesis is that increased interracial contact can lead to more favorable attitudes and friendlier relations between the races rather than increased hostility or reinforcement of stereotypes.[85]

Unfortunately, improvement in racial attitudes is the one area in which the benefits of busing have been hardest to demonstrate, and indeed where some of the most negative effects have been found.[86] Researchers have performed a number of comprehensive reviews of the many studies on desegregation and race relations, and all have tended to come to the same conclusions regarding variability.[87]

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[77]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.
[78]Morris Rosenberg and Roberta G. Simmons, *Black and White Self-Esteem: The Urban School Child* (Washington, DC: American Sociological Association, 1971).
[79]Judith R. Porter and Robert E. Washington, "Black Identity and Self-Esteem," *Annual Review of Sociology*, 5: 53-74 (1979).
[80]Forced Justice, "The Harm and Benefit Thesis," ch. 3.
[81]Nancy St. John, *School Desegregation* (New York: Wiley, 1975).
[82]Walter B. Stephan, "The Effects of School Desegregation: An Evaluation 30 Years after *Brown*," in Saks and Saxe, Eds., *Advances in Applied Social Psychology*, (Hillsdale, NJ: Erlebaum, 1986).
[83]*Forced Justice*, The Harm and Benefit Thesis," ch. 3.
[84]Council of Metropolitan Area Leagues of Women Voters, 5-6.
[85]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.
[86]Ibid.
[87]Ibid.

Like the achievement reviews, reviews of busing's effects on race relations find great variation in individual study findings. The St. John and Stephan reviews also analyzed studies on race relations. They discovered almost equal numbers of studies finding positive effects, negative effects and inconclusive effects of busing on race relations for both black and white students.[88] Janet Schofield, a psychologist who has studied race relations extensively, has written, "In general, the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were. . . . Virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn."[89]

Two case studies assessing race relations are often cited for their sophistication and thoroughness.[90] One, by Harold Gerard of UCLA, evaluated race relations following implementation of a desegregation plan in Riverside, California in 1966.[91] The other, by Martin Patchen, assessed race relations in Indianapolis several years after desegregation had begun in that city's schools.[92]

Gerard's study covered a six-year period following Riverside's implementation of a desegregation plan. He began his work confident that racial balance would produce a significant improvement in race relations, among other measures. "We had hoped that our data would still the critics," he wrote, "by demonstrating that minority achievement, achievement-related attitudes, and self-esteem would improve from pre- to post-desegregation." [93] However, Gerard found that five years after desegregation, when most fourth to sixth graders had been desegregated from the beginning of their schooling, little racial mixing had occurred. He concluded that, "Little or no real integration occurred during the relatively long-term contact situation represented by Riverside's desegregation program. If anything we found some evidence that ethnic cleavage became somewhat more pronounced over time."[94]

Gerard also evaluated the validity of the "lateral transmission of values hypothesis," which has played a central role in arguments advanced by metro-wide busing advocates in the Twin Cities. According to Gerard, "The hypothesis predicts that through classroom contact with their white peers, who should outnumber them, minority pupils would experience what is tantamount to a personality change by absorbing the achievement-related values of the higher achieving whites and would thus start achieving themselves."[95]

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[88]Ibid.

[89]Janet Ward Schofield, "School Desegregation and Intergroup Relations: A Review of the Literature," in Gerald Grant, ed., *Review of Research in Education*, v. 17 (Washington, DC: American Educational Research Association, 1991).

[90]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[91]Harold B. Gerard and Norman Miller, *School Desegregation* (New York: Plenum, 1975).

[92]Martin Patchen, *Black-white Contact in Schools* (West Lafeyette, Indiana: Purdue University Press, 1982).

[93]Harold B. Gerard, "School Desegregation: The Social Science Role," *American Psychologist*, August 1983, 869. In this article, Gerard described his 1975 study. Gerard noted that "We have the dubious distinction of having collected more desegregation data than anyone since Coleman. . . . [W]e studied 1,800 children in a single school district over a period of six years, collecting detailed data on each child from a number of perspectives." Ibid., 869.

[94]Gerard and Miller, 237. Gerard observed that "stereotypes tend to persist rather than dissolve in the mixed classroom. Furthermore, we found only a minuscule number of cross-ethnic work partner or friendship sociometric choices, especially by whites, with virtually no change over the postdesegregation years we studied. The evidence, thus, is strong that self-segregation occurred within the classroom. There was little meaningful contact, let alone contact that would permit learning about each other as individuals." "School Desegregation," 872. "Self-segregation was as true for the younger children -- those who started with desegregation in the first and second grades -- as it was for the older ones." Ibid., 874.

[95]Ibid., 872-73.

Gerard's research did not confirm what he called "this supposed transformation via elbow rubbing."[96] He concluded that, "There is no systematic evidence supporting the idea that the majority can change deep-seated values held by the minority." [97] In sum, he observed that, as a result of assumptions based on the harm-benefit thesis, "A good deal of damage has been done by recommendations that were based not on hard data but mostly on well-meaning rhetoric. Urban districts are now resegregating and becoming less effective in teaching our children."[98]

Patchen's Indianapolis study reviewed the situation in 12 high schools several years after Indianapolis had begun school desegregation. The study, which examined how racial composition in the classroom affected race relations, found that for both black and white students, racial attitudes dropped to their low point when classes reached 20 percent to 40 percent black. For blacks, attitudes toward whites improved significantly when classes either became predominantly white or majority black. Patchen concluded:

> Where there was a small black minority . . . social frictions between the races were relatively low . . . and academic outcomes for both races were relatively good. Where there was a larger black minority . . . frictions between the races generally increased considerably, but academic outcomes (especially effort) remained relatively high for both races . . . . And finally, when there was a clear black majority . . . social relations between the races generally were at their best while academic outcomes generally were low.[99]

No definitive study has evaluated the effect of busing for racial balance on race relations in St. Paul and Minneapolis schools. But there is reason to believe that results have been disappointing. On November 22, 1994, People for the American Way released a report that, "found that even in this age of increasing diversity, race relations and tolerance at St. Paul area high schools is [sic] crumbling."[100] Eighty percent of teachers and administrators interviewed for the report stated their belief that race relations are getting worse in the St. Paul area schools.

A student from Como Park Senior High in St. Paul, which is more than half minority, said that though most people get along well, "There's more cliques among African-Americans and more cliques among whites." Two white students were quoted as saying, "People . . . look at me and assume that I'm prejudiced just because I'm white." On the other hand, 66 percent of black students consulted said they felt they had been treated unfairly because of their race. After 20 years of mandatory busing, St. Paul's Blue Ribbon Commission on Diversity and Equity is urging an effort to eradicate the "systemic racism" assumed to be the cause of such problems.[101]

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[96]Ibid., 873. Gerard enunciated four assumptions underlying the "elbow rubbing hypothesis," and indicated why each is flawed. He observed that some research suggests that "a staunch minority may influence the majority in profound ways." Ibid.

[97]Ibid.

[98]Ibid., 875. Gerard stated that, "We in the social sciences have missed the essential [research and development] link in the chain of applying ideas to practical problems." He urged his fellow social scientists to perform "R & D." "[W]e have to take what we know and try to apply it on a small scale at first to the school setting with a laboratory-like approach. . . . In the process, we will be forced to go back to the drawing board many times until we develop a program that will really work." Ibid., 876.

[99]Patchen, 349.

[100]Wayne Washington, "A Poor Grade on Tolerance," *Star Tribune*, November 23, 1994. The study was based on "voluminous research" collected from March to August 1994. It was based on 154 interviews with school officials, students, parents and other community members; 10 focus groups of high school students; and a written questionnaire completed by 1,576 students and 591 teachers.

[101]The Blue Ribbon Commission on Diversity and Equity, Report to the Superintendent of the Saint Paul Public Schools" (St. Paul Public Schools, May 4, 1994), 3.

Apparently, Minneapolis officials do not believe that decades of busing have improved race relations in their city's schools either. Recently, the district announced a commitment to root out "embedded racism" in its schools. According to a *Star Tribune* report, "The hope is to have schools combat racism by being able to identify how it slips into procedures and affects performance."[102] Neither St. Paul nor Minneapolis personnel seem to have considered that racial resentments may spring, in part, from coercive busing requirements, and from the stress on racial "differences" which animates so many multicultural programs.

c. Long-term outcomes

One shortcoming of busing-related research is that most studies focus on results that have accrued over a relatively short period.[103] Accordingly, some social scientists have suggested that the most important benefits of racially balanced schooling may appear in long-term outcomes, such as educational attainments, occupational outcomes and residential decisions.[104] The 1991 DeKalb Statement particularly emphasized this possibility.

There are far fewer studies of busing's long-term outcomes than of its effects on achievement, self-esteem and race relations.[105] Moreover, most of these studies face serious methodological hurdles in isolating the effects of busing from other factors. Where voluntary busing programs are concerned, researchers must try to account for self-selection. Under other circumstances, researchers must take into account the fact that black students who live in racially mixed neighborhoods may differ from those who live in predominantly black neighborhoods, either in socioeconomic terms or in terms of family preference for "integrated" environments.[106]

Some studies have found that black students who attended majority white K-12 schools were more likely to attend four-year desegregated colleges rather than two-year or segregated colleges, especially in the North. Another group has concluded that black students who attended majority white K-12 schools may choose different types of occupations and work settings than other black students do. A third group finds that black students in majority white schools attain more years of education than their counterparts in majority black schools, although the strength and consistency of the relationship are questionable.[107]

Of such studies, those by Columbia University's Robert Crain and his colleagues are most significant.[108] Crain performed a 16-year follow-up of black participants in Project Concern, a voluntary busing program in Hartford, Connecticut, which permits students from city schools to transfer to predominantly white suburban schools.[109]

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[102]Laurie Blake, "Search Is On for Embedded Racism," *Star Tribune*, December 5, 1994.

[103]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[104]Ibid.

[105]Ibid.

[106]Ibid.

[107]Ibid.

[108]Crain is one of the few social scientists who argues that school busing alone causes significant academic gains for black students. In 1982, Crain published a meta-analysis of 93 studies of the effects of desegregation on black achievement, which concluded that desegregation benefits black achievement, though large effects are confined to students in kindergarten and first grade. Robert Crain and Rita Mahard, "Desegregation and Black Achievement: A Review of the Research," *Law and Contemporary Problems* (Vol. 43, No. 3, Summer 1978); "The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta Analysis," *American Journal of Sociology*, 88: 839-854, 1983. See "Why Is Black Educational Achievement Rising?" 72.

[109]Robert L. Crain, Randi L. Miller, Jennifer A. Hawes, and Janet R. Peichert, *Finding Niches: Desegregated*

Crain found that black students who completed Project Concern had significantly higher educational attainment, and significantly lower dropout rates, than their counterparts in a control group in city schools. He explained:

> The main finding of our study is that participation in Project Concern increases the chance of graduating from high schools, and, for males, increases the number of years of college they attend. . . . Students who entered Project Concern and remained in Project Concern schools until they finished their education all graduated from high school and one-half the males attended college. Nearly a quarter of the males had three or more years of college when they were interviewed, and it is likely that most of these students will eventually get diplomas. In comparison, over a third of the males and one-sixth of the females who were in the control group and who attended only inner city schools did not graduate. However, desegregation does not seem to be related to female college attendance rates; members of the control group are as likely to have three years of college as are those who attended Project Concern schools.[110]

This differential might seem to suggest that education in a racially balanced environment significantly benefited Project Concern participants. However, about half of the Project Concern students left the program before finishing, and most returned to Hartford schools.[111] This raises a crucial question: Did the higher educational attainment of those who completed the program result from "racial balance," or was it simply a function of self-selection -- of better outcomes in a group that was more academically motivated and talented in the first place?[112]

In fact, students who volunteered for Project Concern had higher socioeconomic profiles than those from the control group. Moreover, students who withdrew from the program were having

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Students Sixteen Years Later: Final Report on the Educational Outcomes of Project Concern, Hartford, Connecticut (New York: Institute for Urban and Minority Education, Teachers College, Columbia University, June 1992).

[110]Ibid., 12-13. Crain summarized Project Concern's benefits as follows: Male participants were more likely to graduate from high school (the effect on females was weaker); male, but not female, participants completed more years of college; male, but not female, participants perceived less discrimination in college and other areas of adult life; male, but not female, participants experienced less difficulty with the police and got into fewer fights as adults; participants had closer social contacts with whites as adults, were more likely to live in desegregated housing, and had more friends in college; and female participants were less likely to have a child before age 18. *Finding Niches*, v.

[111]Crain's explanation of this is as follows: "The drop-out rate for the program was quite high, probably reflecting a combination of black discomfort in a racially threatening situation plus the inability of white school staff to deal adequately with the prejudice of their white students and with black students who were emotionally and academically unprepared for desegregation. More women than men remained in the program through graduation; approximately half of all the students participating in the program dropped out and returned to segregated schools in Hartford. Those who did remain gave very positive evaluations of their school experiences. In the view of the alumni of the desegregated program, the most important benefit of desegregation was the opportunity to learn to relate to white students." *Finding Niches*, vi.

Crain noted that "black males, who benefit most from the Project Concern desegregation program, are more likely to drop out. . . . Males (black or white) cause more trouble in school, are more likely to get suspended and black males are more likely to quit the program voluntarily, so it may be difficult to decrease their drop-out rate. . . . Over half of the male students entering the program in 1966-67 finished their schooling outside of Project Concern. The drop-out rate has not probably changed greatly; only 24 out of the 69 present Project Concern high school students whom we interviewed were males." Ibid., 57.

[112]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3. Of course, the problem of self-selection has an important bearing on Crain's findings regarding other benefits, such as males' decreased trouble with police and females' postponement of childbirth. Crain and his colleagues attempted to deal with the significant problem of self-selection in Appendix B, "Analysis of Self-Selection and Response Bias." *Finding Niches*, 63.

more academic and behavioral problems than those who stayed in. As Armor explains in *Forced Justice*, when both college attendance and high school dropout rates are compared for all original Project Concern students and the Hartford control groups, Project Concern appears not to have produced significantly better educational outcomes than the Hartford schools.[113]

In an attempt to distinguish between the effects of racial balance and self-selection, one more piece of data is relevant. It is possible to compare the educational attainment of students who completed Project Concern and those who withdrew, classifying the withdrawals by how long they remained in the program. As Armor explains, if the length of "desegregation" were the critical difference for stay-ins, withdrawals who stayed longest should show higher attainment than those who withdrew early on. In fact, if anything, those withdrawing after one or two years had slightly better outcomes than those who stayed in for six to 10 years, although the differences are not statistically significant.[114]

Clearly, Crain's study is an important contribution to the literature on the long-term effects of busing for racial balance. But, at the very least, it suggests that the benefits of "desegregation" are not uniform, even for those who volunteer for it.[115] It also emphasizes the importance of making a rigorous effort to isolate the effects of self-selection before drawing conclusions about the benefits of racial balance.

Though Crain did not study the educational achievement of Project Concern participants, such studies were carried out by Edward F. Iwanicki and Robert K. Gable. In a 1978 report, Iwanicki and Gable compared educational achievement of Project Concern students and a control group of students remaining in Hartford, who met the eligibility criteria for participation in Project Concern. According to Iwanicki and Gable:

> No statistically significant differences were found between the two groups, except at the grade 7 level on Letter Identification . . . and Word Comprehension . . . subtests. In both cases the Project Concern students had higher scores than the Hartford students. . . . [N]o significant differences were manifest in reading achievement growth when the Suburban Project Concern and Hartford students were compared.[116]

Iwanicki and Gable's findings were similar in 1985. In a *Final Evaluation Report* presented to the Hartford Public Schools, they reported:

> After matching students on the basis of sex, ethnic group, Hartford sending school, and Spring 1981 Reading and Math achievement levels, no significant differences were found between the Suburban Project Concern and Hartford comparison students from Spring 1982 to Spring 1984 in Reading and Math and through Spring 1985 in Reading. Hartford 1981 grade 4 students achieved significantly . . . higher levels than Suburban Project Concern students in 1985 grade 8 Math scores.[117]

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[113]*Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

[114]Ibid.

[115]Ibid.

[116]Edward F. Iwanicki and Robert K. Gable, *A Quasi-Experimental Evaluation of the Effects of a Voluntary Urban/Suburban Busing Program on Student Achievement* (Paper presented at the Annual Meeting of the American Educational Research Association, Toronto, Canada, March 30, 1978).

[117]Edward F. Iwanicki and Robert K. Gable, *Final Evaluation Report: 1984-85 Hartford Project Concern Program* (Presented to the Hartford Public Schools, August, 1985).

(5) Why has black achievement improved?

Overall, the social science literature on busing casts grave doubt on the proposition that black students' recent academic gains have resulted from "desegregation;" i.e., sitting next to white children in class. What does explain the fact that black students have halved the learning gap on reading and math in the last 20 years?

Many educators attribute black gains to compensatory and remedial programs. Such programs may partially explain these gains. But several important studies suggest that they are not primarily responsible for the reduction of the learning gap.

The largest compensatory programs are Head Start and Title 1 -- formerly Chapter 1 -- the effectiveness of which have been comprehensively analyzed. One of the most complete evaluations of Head Start was a "meta-analysis" sponsored by the Department of Health and Human Services in 1985.[118] In this study, a formal quantitative review of a large number of separate evaluations of Head Start programs was carried out. The study found that though Head Start did have a positive short-term effect on minority student academic achievement, the program's effect was not long-lasting. After several years in school, there was no difference between the academic achievement of Head Start and comparable non-Head Start children.[119]

In 1985, the U.S. Department of Education performed one of the largest and most comprehensive studies of the effects of Chapter 1 compensatory programs on academic achievement,[120] by reviewing a large number of separate evaluations of Chapter 1 programs. Results indicated that though Chapter 1 programs have positive effects, these effects are not large enough to account for the reduction in the black-white achievement gap observed in the NAEP data.[121] A second study, by the Congressional Budge Office, estimated that Chapter 1 programs had reduced the black-white achievement gap by about 10 percent.[122] Armor concludes that compensatory programs account for much less than half of the improvement observed in black achievement.[123]

a. The Harvard Desegregation Project Study

A recent study by Gary Orfield's Harvard Project on School Desegregation casts additional doubt on the likelihood that expensive remedial programs will raise minority achievement in Minnesota.[124] The study, released in April 1994, evaluated minority achievement in four large school districts that had attempted to "address segregation by pouring money into special programs for schools with large minority populations, rather than busing students."[125] These cities and communities were Detroit; Little Rock; Austin, Texas and Prince George's County, Maryland. The report concluded that there is "no evidence whatsoever that the expensive programming and

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[118]Department of Health and Human Services, *The Impact of Head Start on Children, Families and Communities* (OHDS-90-31193, June 1985).

[119]"Why Is Black Educational Achievement Rising?" 76.

[120]Department of Education, *The Effectiveness of Chapter 1 Services* (1986).

[121]"Why Is Black Educational Achievement Rising?" 76.

[122]Daniel Koretz, "Educational Achievement: Explanations and Implications of Recent Trends" (Congressional Budget Office, 1987).

[123]"Why Is Black Educational Achievement Rising?" 80..

[124]Joseph Feldman, Edward Kirby and Susan Eaton, *Still Separate, Still Unequal: The Limits of Milliken II Educational Compensatory Remedies* (Cambridge, MA: Harvard Project on School Desegregation, April 1994).

[125]Debra O'Connor, "Metropolitan Desegregation Plan Seeks to Bridge the 'Learning Gap,'" *Pioneer Press*, April 10, 1994.

extra money" has significantly improved minority achievement.[126]

Orfield told the *Pioneer Press* that the Harvard study demonstrated that "just throwing money at the problem isn't enough." As the paper put it, "The four districts [Orfield] studied spent millions and got nowhere."[127] Nevertheless, the *Pioneer Press* reported that Orfield believes such programs might work in the Twin Cities. The crucial difference, Orfield indicated, may be "attitude." In Orfield's opinion, though the four cities he studied "spent millions," they "didn't even try seriously. They wanted to give the appearance of compliance without any serious plan or serious evaluation or clear goal."[128]

Educators in Minneapolis and St. Paul have been trying seriously to raise minority achievement for 20 years. Their commendable "attitude" does not seem to have led to success. Advocates of the proposed learning gap rule now call for "state money -- and lots of it" to close the gap. Yet there is no reason to believe that urban schools in the Twin Cities will use this money more effectively than their counterparts in the four cities the Harvard Project studied.

b. Socioeconomic gains of black parents

If busing and compensatory education cannot adequately explain black achievement gains of the last two decades, what can? Black achievement seems to be most strongly linked to socioeconomic gains by black parents. In 1967, James Coleman found that the strongest predictors of both black and white achievement levels were socioeconomic factors like parental education, income and job status.[129]

Recent NAEP data confirm that this remains true today. As previously noted, the strongest correlate of black achievement gains identified by NAEP seems to be improvements in the socioeconomic status of black families. Armor has found that trends in improvement of socioeconomic status have been similar to trends in student achievement. Thus, by 1990, when the racial achievement gap observed in 1971 had been reduced by half, black and white parents' education gap had been reduced by more than half, from 20 points to four points.[130] Parental educational attainment, rather than the racial or socioeconomic composition of the school that children attend, seems to explain a significant proportion of recent black student achievement gains.[131]

Armor has explained the nature of the link between parental education and student achievement:

> The increased education of black parents is not necessarily the direct cause of achievement gains. Rather, educational status probably indicates a host of specific family behaviors and attitudes -- such as motivation, educational aspirations, child-rearing practices, help with homework -- which become the mechanisms by which

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[126]Ibid.

[127]Ibid.

[128]Ibid.

[129]"Why Is Black Educational Achievement Rising?" 77.

[130]Armor states that in 1971, when the achievement gap was larger, only 21 percent of 13-year-old black students reported parents with post-high school education, compared to 41 percent for white students. By 1990, when the gap had been reduced by half, the parental education gap had been reduced by more than half. Simultaneously, the rate of post-high school education for black parents increased to 49 percent, while it rose only to 53 percent for white parents. Ibid., 77-8.

[131]See Christopher Jencks, *Inequality* (New York: Basic Books 1972); Gerald Jaynes and Robin Williams, Jr., *A Common Destiny: Blacks and American Society* (Washington, DC: National Academy Press, 1989).

parents' educational status is translated into actual academic improvement for their children. [132]

In 1994, Rand published a study that confirmed the importance of family characteristics on student achievement.[133] The Rand study compared NAEP data to data concerning family and demographic characteristics taken from the National Longitudinal Survey of Youth and the National Education Longitudinal Survey.

The study found "large differences in test scores for family/demographic characteristics and great similarity in the direction and relative significance of these differences."[134] For example, "a child whose mother or father graduated from college scores approximately 1.0 standard deviation higher than a child whose mother or father did not graduate from high school. . . . Somewhat smaller test score differences are evident among young people living in families with different levels of annual income ($40,000 versus $15,000), families of different size (four siblings versus one sibling), families having older and younger mothers (age 30 at birth versus age 18), and two-parent families versus single-parent families. For instance, children living in two-parent families score about 0.30 to 0.40 of a standard deviation higher than those in single-parent families, while children in large families score approximately 0.30 of a standard deviation lower than children from smaller families."[135]

Apparently, the Desegregation Roundtable shares the belief that socioeconomic factors are important in academic achievement. Moreover, the Roundtable seems aware that such factors are largely beyond the control of schools. Consequently, in its February 1994 report, the Roundtable recommended that the Legislature "assign responsibility to the Metropolitan Council to provide metropolitan wide direction regarding housing, transportation, employment and other policies which need to be addressed to assure [a] racially and economically desegregated metropolitan area."[136]

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[132]"Why Is Black Educational Achievement Rising?" 79.

[133]David W. Grissmer, Sheila Nataraj Kirby, Mark Berends, Stephanie Williamson, *Student Achievement and the Changing American Family* (Santa Monica, CA: Rand, 1994).

[134]Ibid., xxii.

[135]Ibid., xxiii-xxiv. The study found that, "National mathematics and verbal/reading test scores of representative samples of U.S. students aged 13 and 17 have risen over the last 20 years by about the same magnitude, or slightly less than the estimated family/demographic effects. . . . [But] [c]omparisons of our estimated gains by racial/ethnic group show that the actual gain in black and Hispanic scores far exceeds the gain predicted from family characteristics alone. Family gains account for approximately one-third of the minority gains." Ibid., 106-7.

The authors indicate that further research is needed concerning causes of these unexplained gains. In their view, "The most likely explanation for the gains made by black and Hispanic students over and above those predicted by family effects is changes is public policies and the very large increases in public investment in social and educational programs aimed at minorities and lower-achieving students." Ibid.

However, the Rand study could not measure directly the effects of social policies (such as desegregation) because the data used did not indicate, for example, whether children studied were part of desegregation programs. The study merely computed "residuals," and speculated about possible causes. Studies that do directly measure factors like compensatory education often find them unimportant, as has just been seen. Even Gary Orfield has observed that, "The large review of the major federal compensatory program, Chapter I, prepared for congressional debates on the extension of the largest federal education program, produced no real evidence of educational gains." Alison Morantz, *Money, Choice and Equity in Kansas City: Major Investments with Modest Returns* (Cambridge, MA: The Harvard Project on School Desegregation, April 1994).

Surely sweeping public policy changes since 1964 have fostered integration in myriad ways that have assisted black citizens. But the Rand study's speculations about the effects of such changes on academic performance should not be taken as statements of fact. For a discussion of the study's flaws in this respect, see William Styring III, "Lies, Damn Lies, and Statistics: A Response to Rand," *Network News and Views* (The Educational Excellence Network), February 1995.

[136]Roundtable Discussion Group Final Report, 7-8.

It remains to be seen whether government measures carried out under the Met Council's direction will advance the socioeconomic status of substantial numbers of minority families, though this seems unlikely. But given the central role that socioeconomic factors seem to play in student achievement, the severe penalties the proposed rules inflict on schools where learning gaps persist are unwarranted and probably counterproductive.

(6) Black opposition to busing

Nationally, some black leaders -- aware of families' and neighborhoods' crucial role in academic performance -- are making a return to neighborhood schools the focus of efforts to raise black achievement. Black mayors and city council members, in particular, are rejecting "racial balance" as a central goal, and seeking instead to promote parental involvement and stabilize social institutions in inner cities. Recent articles in *Emerge* [137] magazine and the *Los Angeles Times* have highlighted this trend. According to the *Times* article, "the 40-year battle to integrate America's schools has ground down into a Pyrrhic victory that offers only faint progress for minority students and drains resources from inner-city communities and public schools."[138]

The *Times* points out that opinions about busing break down more on generational than racial lines, with young black leaders increasingly facing off against old-line groups like the NAACP. Today, black mayors in Denver, Seattle, Cleveland and St. Louis are among the most outspoken opponents of race-based busing. Black city council members in Atlanta, Louisville, and Charlotte have also taken steps to end what they see as destructive busing programs.

In Cleveland, for example, Mayor Michael White recently helped convince a federal judge to minimize cross-town busing and allow the city to focus on retooling its own schools. "Why keep kids in a school desegregation program that's not working?" the mayor asked in an interview with *Emerge*.[139] Apparently, "new blood" in the city's NAACP chapter helped White convince the judge to minimize Cleveland's busing plan in favor of school choice, magnet schools and improved city schools. Likewise, in Seattle, Mayor Norman Rice has led the charge to replace busing with school choice and magnet programs. "I decided we had better turn off the racial issues and begin talking about quality education," he has explained.[140] Denver's Mayor Wellington Webb has made similar efforts in his city. Minneapolis Mayor Sharon Sayles Belton is the latest prominent official to join this growing group.

Increasingly, rank-and-file black citizens seem to agree with these black mayors. For example, in a recent Gallup survey for *USA Today*, black respondents said by a roughly 2-1 majority that they would rather strengthen neighborhood schools than increase efforts at "integration."[141] Likewise, a Russell Sage Foundation survey of black citizens found that 3 out of 5 support the creation of all-black male academies within public school systems.[142]

Not surprisingly, a neighborhood-school initiative is taking shape in Minneapolis. In November 1994, a district task force outlined a plan to put parental choice and neighborhood cohesion -- rather than racial balance -- at the center of school reform. A *Star Tribune* report provided details:

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[137]Robert L. Joiner, "Black Mayors Driving Away from Busing," *Emerge*, March 1994, 52.
[138]Stephen Braun, "A Surprise Roadblock for Busing," *Los Angeles Times* (Washington Edition), November 16, 1993.
[139]"Black Mayors Driving Away from Busing," 54.
[140]Ibid., 53.
[141]Ronald Brownstein, "Pursuit of Integration Weakening," *Star Tribune*, May 16, 1994.
[142]Ibid.

> Responding to parents who want their children at one school near home through their elementary years, a Minneapolis School District task force and the district administration have proposed that the school board elevate home-to-school proximity as a top guideline for placing children in schools . . . . Carrying out such a plan . . . would require some relaxation of racial mix goals now imposed by the state. . . . [The task force is] reaching for more school stability for students, increased family-school involvement and stronger school communities. . . . "These kids so need stability in their lives. Our immediate goal is to help build stronger school communities for kids," said Elizabeth Hinz, district director of policy and planning.[143]

Some Minneapolis board members acknowledged that the district's efforts to achieve racial balance had not led to improved minority achievement. Board member Sandra Harp spoke of the new plan's ramifications for "desegregation." "Desegregation has traditionally meant we've gone strictly by numbers," she said. "That's never been related to educational quality necessarily. If we are committed to providing a quality education to each student in the district, then we do not need to be concerned about what the numbers are; we need to be concerned about the educational opportunities that we are providing for each and every student."[144]

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[143]Laurie Blake, "Placement Plan Would Relax Racial Mix Goals," *Star Tribune*, November 23, 1994.
[144]Ibid.

CHAPTER V
The Failure of Busing in Other Cities

A review of conditions in cities that have pinned their hopes for improved minority performance on large-scale busing programs may prompt Minnesotans to encourage the Minneapolis School Board in its efforts to build stronger neighborhood schools. As indicated earlier, most cities that have taken this course have encountered serious problems.

(1) St. Louis

Advocates of the Roundtable's new metro-wide busing plan have sometimes invoked St. Louis' desegregation plan as a model for efforts here. Yet St. Louis Mayor Freeman Bosley, who is black, is a strong critic of the plan, and among the nation's most outspoken opponents of busing. St. Louis' desegregation program is the result of a consent decree reached in connection with litigation in 1983. The decree created a "voluntary" plan that involves busing approximately 1,200 white suburban students to city magnet schools, and 13,000 minority students from the city to largely white suburban schools.[1]

St. Louis' plan has proven extremely expensive, having cost the city and state over $1 billion since its inception. In 1993, Missouri awarded suburban schools and bus companies $52 million to cover program costs. The program's magnet component is among the most successful in the nation at attracting white suburban students. But transportation costs for these students can be tremendous -- up to $3,500 a year per student. Some white students are even chauffeured to school in taxicabs, at an annual cost to taxpayers of nearly $2 million.[2]

Moreover, St. Louis magnet schools have a hierarchical admissions policy designed to improve racial balance. White suburban students are given first priority, white resident students second priority, and black resident students third priority. Critics observe that many black students who wish to attend these schools cannot get into them. Thus, the very students the plan is designed to help frequently receive no benefits unless they are willing to accept long bus rides.

Despite the St. Louis program's costs, minority scores have stagnated, and inner-city schools -- still attended by the majority of black students -- have suffered. "What has busing done for the black community?" Mayor Bosley has asked. "We still have 47 all-black schools after 11 years of integration [out of 50 city schools], we're losing some of our best minds to the suburbs and we can't afford to pay for basic improvements and equipment at most of our schools." Mayor Bosley believes that, "Some people are content to stand in concrete, but there are a lot of black parents who think it's time for a change."[3]

Bosley's central assumption is that rebuilding social institutions in the black community is fundamental both to enhancing quality of life and improving student achievement. "We're never going to trust our own schools and our own neighborhoods as long as we keep sending our kids off to the suburbs every morning," he told the *Los Angeles Times*.[4]

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[1]Interview with Tim Jones, Desegregation Services Department, Missouri Department of Elementary and Secondary Education, February 6, 1995.
[2]*A Surprise Roadblock for Busing*.
[3]Ibid.
[4]Ibid.

(2) Kansas City

After rejecting Kansas City plaintiffs' argument that suburban districts be included in a desegregation plan, the *Jenkins* court ordered a massive reorganization of city schools, turning most into specialized magnets intended, in part, to attract white suburban students on a voluntary basis. To fund this ambitious plan, the court ordered a near doubling of local property taxes -- a move the Supreme Court upheld despite the Kansas City City Council's opposition. As of 1994, the Kansas City district had spent more than $1.3 billion on desegregation, including $838 million in state funds.[5] In fact, as already noted, Missouri now spends between six percent and eight percent of its entire state budget on desegregation aid to St. Louis and Kansas City, an amount that does not include regular school aids.

As a result of the *Jenkins* plan, one Kansas City school now has 800 computer terminals for its 1,200 students, as well as a full-time staff that includes a weight trainer, a diving instructor and a Russian fencing instructor and his interpreter. Yet despite changes of this sort, the district's minority students actually increased from 73.5 percent of enrollment in 1986-'87 to 74.8 percent in 1992-'93.[6] Moreover, suburban white students have shown little interest in attending city schools, and only 65 percent of white transfers stay a second year.[7] The majority of magnet schools are not desegregated as required by the court order. Minority test scores remain so low that the *Jenkins* plaintiffs argue that unitary status should be denied.

Gary Orfield's Harvard Project on School Desegregation recently completed a study of the results of the Kansas City plan.[8] The Harvard group found academic results disappointing, and seemed to suggest, as they had in other instances, that Kansas City hadn't tried hard enough. The study particularly called into question the value of magnet schools. "Trying to bribe white parents from the suburbs into sending their kids into the inner city -- even if these schools have terrific facilities -- is unlikely to achieve significant results," said author Alison Morantz. The study asserted that, "The most appropriate goal for magnets is not to desegregate but to enhance educational quality for disadvantaged minority students." But "[a]s vehicles for educational improvement," it continued, "even the most ambitious and comprehensive magnet remedies may accomplish little without vigilant monitoring and enforcement."[9]

Orfield's comments about the Kansas City experiment are particularly significant, given his role as an advisor to the Minnesota SBE. (Like the Kansas City plan, the SBE's proposed metro-desegregation plan would rely heavily on magnet schools to attract suburban students, and would necessitate significant spending to "close the learning gap.") In a foreword to the Morantz study, Orfield stated that "The story is a disappointing one for me, since I appeared as the final witness for plaintiffs . . . more than a decade ago." Orfield noted that, "In contrast to almost all U.S. central cities, Kansas City now has the newest, most elaborate school buildings and the most extraordinary special schools and programs in the state. . . . Kansas City had the unique opportunity to implement virtually any kind of magnet and choice it could dream up with almost no funding limit. . . . If simply funnelling large amounts of money and choice into a system can

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[5]Linda Greenhouse, "High Court to Review Kansas City School Desegregation Case, *New York Times*, September 27, 1994.

[6]Rochelle Sharpe, "Controversial Missouri Schools Project Is Bringing Modest Gains, Study Finds," *Wall Street Journal*, April 26, 1994. Despite the extraordinary measures taken to attract white students, "in Kansas City in 1991-92, no African-American student attended a school in which a majority of students were white." Alison Morantz, *Money, Choice and Equity: Major Investments with Modest Returns* (Cambridge, MA: Harvard Project on School Desegregation, April 1994), foreword by Gary Orfield.

[7]"Controversial Missouri Schools Project Is Bringing Modest Gains, Study Finds."

[8]Morantz.

[9]"Controversial Missouri Schools Project Is Bringing Modest Gains, Study Finds."

produce large educational gains, we should see them in Kansas City."[10]

Noting the study's disappointing results, Orfield commented, "Clearly, it is much more difficult to substantially improve education for disadvantaged children than we had hoped. . . . [T]ransfers into the magnets from the suburbs have been very small and the city's African American students remain concentrated in schools with a small minority of whites." He continued: "This study's findings of limited results from huge investments is compatible with several recent major national studies revealing the difficulty of achieving large changes through compensatory education or choice."[11]

Orfield concluded that a city-suburb busing plan giving urban minority students "access to the already effective white schools in the suburbs" was the only real alternative to the failed Kansas City experiment. "[A]chieving more," he declared, "will require stronger oversight. A court order, the key to the state treasury, and a good monitoring committee have not been enough. Achieving greater educational equity is likely to take long-lasting, intensive intervention from the court."[12] One wonders if Orfield's vision for the Twin Cities is similar.

(3) San Francisco

San Francisco's experience illustrates the extent to which a race-based approach to minority performance problems can actually make problems worse, and is therefore worth a detailed look. A 1982 consent decree divided San Francisco students into nine racial and ethnic groups, and quotas were imposed on most district schools.[13] Schools in one largely black area, operating under a special plan, were "reconstituted."

San Francisco's experience is particularly significant for Minnesota. The consent decree imposed a desegregation plan with learning gap provisions similar to those set forth in the 1994 version of Minnesota's proposed desegregation rules, which the SBE has unanimously endorsed. It included provisions designed to ensure "equity" in discipline and special education assignment.[14] In addition, it required the San Francisco district to increase the percentage of minority faculty and staff, and to ensure that faculty and staff were "equitably assigned" throughout the district.[15] Gary Orfield was involved in formulating the San Francisco consent decree and desegregation plan.[16]

In 1992 -- 10 years after implementation of the San Francisco plan -- a court-appointed committee evaluated its success. Orfield was chairman of this committee, and David Tatel served as a

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[10]Morantz, foreword.

[11]Ibid.

[12]Ibid.

[13]The decree required that every school have at least four racial/ethnic groups, and that no racial or ethnic group exceed 45 percent of the enrollment of any regular school or 40 percent of any alternative school, with the exception of 19 schools that had varying enrollment standards reflecting earlier practices. Gary Orfield, "*Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation*" (Submitted to Judge William H. Orrick, U.S. District Court, San Francisco, California, July 1992), 16. The decree permitted the desegregation of black students with Chinese, or Hispanics with Vietnamese, "among many other possibilities." Chinese students represent the largest racial/ethnic group in the San Francisco schools. Ibid., 3.

[14]Ibid., 16-17, 61. The decree also sought to ensure "equity" in extracurricular activities.

[15]Ibid., 17. The proposed Minnesota rules also require increased numbers of minority faculty and staff. Roundtable Discussion Group Final Report, Appendix D, 8. The rules prohibit "separation" of minority staff "within a building or school district." Ibid., 5. The San Francisco consent decree also required joint action by the parties to promote housing desegregation. *Desegregation and Educational Change in San Francisco*, 17.

[16]Cross-examination of Gary Orfield at 101, *Sheff v. O'Neill*, No. CV-89 360977 S (Super. Ct. Conn.).

representative of the San Francisco School District.[17] The report noted that the consent decree had had two related goals: improved academic performance and desegregation of San Francisco schools.[18] The "basic theory" behind the consent decree, it observed, was that "disadvantaged minority students will gain either by the upgrading and desegregation of their local school or by transferring to a better school."[19] According to the report, "Consent Decree programs were designed to help close the [performance] gap"[20] between black and Hispanic students and their peers, especially Chinese and white students.

a. Academic performance

The Orfield report found that the San Francisco School District had "largely achieved" the decree's desegregation goals, having integrated both schools and classrooms.[21] However, the report concluded that the district had "not realized the goals for academic achievement for the overwhelming majority of African American and Hispanic students in the critical areas of educational attainment, dropouts, special education placement, and suspensions from school."[22] After eight years and an expenditure of over $200 million, "huge gaps" remained among racial and ethnic groups' performance,[23] and "African American students and Hispanic students still face devastating levels of educational failure."[24]

Contrary to planners' hopes and expectations, the large expenditures mandated by the consent decree did not, in most cases, lead to improved academic performance. Indeed, the report declared that, "Weak achievement results, the lack of even modest overall improvement for most African Americans and Hispanics across the District after grade school, and the many examples of schools with large budgets and small results, indicate the need for a hard analysis of the way in which the educational reform and desegregation requirements are working."[25]

The Orfield report found that, in cases where poorly performing inner-city schools had been given "large amounts of new money and staff, there were no overall academic gains for African American and Hispanic students according to the District's own data."[26] Specifically:

> After eight years of programs under the Consent Decree . . . the 1991 District-wide test data show that in reading, language arts, and mathematics, at every grade tested, African American and Hispanic students performed at the bottom. The results show radically different patterns of educational attainment among the city's ethnic groups, with little overlap. . . . African American and Hispanic students, as

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[17]The report was compiled by a committee of seven experts representing each of the contending parties in the lawsuit that led to the consent decree.

[18]Ibid., 1. "The Consent Decree has two primary objectives: (1) 'To eliminate racial/ethnic segregation or identifiability in any SFUSD school, program, or classroom and to achieve the broadest practicable distribution throughout the system of students from the racial and ethnic groups which comprise the student enrollment of the SFUSD . . .'; and (2) 'to achieve academic excellence throughout the SFUSD. . . .' The Decree not only saw desegregation and educational improvement as compatible but it relied on the creation of attractive educational programs as a basic strategy to accomplish desegregation of the system's remaining segregated schools." Ibid., 16.

[19]Ibid., 38.

[20]Ibid., 28.

[21]Ibid., 1, 4.

[22]Ibid., 1.

[23]Ibid., 9

[24]Ibid., 1.

[25]bid., 32.

[26]Ibid., 5.

groups, remained far below District and national norms from first through twelfth grade.[27]

> The most recent data show little or no progress. Test scores for 1991 showed a drop from the previous year, particularly in the higher grades. Contrary to expectations, schools receiving both federal dollars for high poverty schools (Chapter I) and special Consent Decree programs actually performed *worse* in reading than schools receiving only Chapter I funds. The same is true in math at the high school level. On average, Consent Decree programs had little apparent effect on achievement, where help was most urgently needed. Only pre-high school math showed gains [emphasis in original].[28]

The Orfield report found that the longer students were in school, the greater the racial gap became:

> Detailed analysis of achievement trends shows that the racial gaps . . . become worse after elementary school. . . . The high school achievement and dropout data are particularly disappointing with the exception of the success of the plan in creating a strong new academic high school in the African American community. . . . In general, however, most African American and Hispanic High School students continue to show very low test scores and very high dropout rates, even in targeted Consent Decree schools.[29]

In addition to analyzing district-wide achievement data, the Orfield report provided a glimpse of how the consent decree had operated in individual schools:

> Achievement data shows that money by itself often has very little impact. Some schools spent a million dollars or more in supplemental funds without showing improvements. . . . One Consent Decree targeted school, for example, was three-fourths African American and Hispanic in 1990-91, with 71% of its students receiving free lunches and more than a fourth not fluent in English. The Consent Decree provided the school with an extra $502,000 for that academic year which paid for nine additional teachers and aides and four extra clerical and support staff in a school whose core budget provided for only 16 professionals and 1.5 clerical staff. In other words, the Consent Decree greatly increased the capacity of the school to provide educational services. At four of its five grades, however, the school's test scores were lower in the 1989-90 school year than they had been two years earlier.[30]

Besides reviewing regular school programs, the Orfield report examined the results of several special programs that had been devised to serve consent decree goals in a number of schools. Two of the programs, "Saturday School" and the "Seventh Period Program," "were intended to address learning problems by providing additional time for instruction. Both began in 1990. The District's

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[27]Ibid., 30.

[28]Ibid., 30-31.

[29]Ibid., 29; 5.

[30]Ibid., 36. The report provided a further example of the failure of additional money to promote improvement: "Another school was larger with 650 students, three-fourths African American and Hispanic and 76% poor. Consent Decree funds produced class sizes far below the District average, particularly for kindergarten and fifth grade. The Consent Decree contributed an extra $451,000 to the school's budget. With the exception of first grade math, however, all of the test scores were still far below national norms. In some grades more than nine-tenths of the students were below national norms. Considering the amount of extra money spent in these schools, effective leadership and dedicated teachers should have made a difference." Ibid.

initial evaluations show little impact to date." [31] According to the report:

> The Saturday School Program provided the opportunity for students needing more help to obtain three hours of additional instruction in smaller classes with aides on Saturday. Students performing below the 40th percentile in language arts were invited to apply. African Americans and Hispanics made up more than half of those eligible but only 30% of the participants. The program was 46% Chinese, although Chinese were only 18% of those eligible. . . . The overall achievement test data showed no significant gain for participants the first year . . . .[32]

Seventh Period classes were offered to students in grades 6 through 9 during the 1990-91 school year. Students who were at least 10 percent below national reading norms were invited to participate. Nearly 3,200 students enrolled -- 43 percent of those eligible. However, "Student test scores appeared to be weakly related to enrollment in the program (actual attendance was not measured). The effects were small."[33]

Another large program -- "ACCESS" -- operated in a number of schools, and was supervised by a team at the University of California, Berkeley. The ACCESS program aimed at upgrading mathematics and English performance. According to the Orfield report:

> One of the central problems for college-bound African Americans and Hispanics has been the failure to enroll in and complete ninth grade algebra. This is one of the courses that has a very strong impact on selection of and success in other classes . . . . The enrollment patterns of African American and Hispanic students in schools offering [ACCESS] do not yet demonstrate increased participation rates. There was, however, real progress in writing that might well be related to that part of the ACCESS program.[34]

b. Special education

The consent decree's manifest failure even to approach its goals extended well beyond test scores. Like the SBE's proposed 1994 rules, the decree also "called for assuring equity in many aspects of district operations," including special education assignment and discipline rates.[35] (Consent decree drafters apparently used "equity" to mean proportional representation of all racial/ethnic groups.) The Orfield report generally treated racial/ethnic differences as *prima facie* evidence of inequity or discrimination, rather than a function (for example) of differences in family structure, or other factors beyond schools' control.

El mination of "discriminatory placement of minority students in special education" was one of the consent decree's goals.[36] However, according to the Orfield San Francisco report, as of 1990-'91:

> Chinese, Filipino, Korean, Japanese, and Other Non-White groups are under-represented in . . . special education groupings. The Committee found that African American youth participation is double that which would be expected from

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[31] Ibid., 45.
[32] Ibid.
[33] Ibid., 45-46.
[34] Ibid., 46.
[35] Ibid., 5.
[36] Ibid., 61.

examination of total District enrollment percentages and concluded that the District must take steps to correct this disproportion.[37]

c. Discipline rates

Consent decree programs fared no better at reducing racial/ethnic gaps in discipline rates. The report observed that "the Consent Decree recognized the historical disparities in discipline and suspensions and called for District efforts to end them."[38] However,

> Student suspension rates by race for the year 1990-91 . . . still show an extremely disparate pattern. . . . African Americans, less than 20% of the student population, account for almost half of all school suspensions. Their suspension rate of 10.4% is two and one half times higher than the District-wide rate. The only other group that even approaches this level is Hispanic. The seven remaining ethnic groups have a suspension rate of only 2.0%. The Committee found that such a disparity in suspension rates is highly significant statistically and concluded that the District must take steps to correct it.[39]

According to the report, while black students comprised 50 percent of all students suspended in 1990-'91, they made up 56 percent of all students suspended for fighting. Indeed, 75 percent of black students who were suspended were suspended for fighting.[40] The report suggested that discrimination might well account for this disproportion:

> These disparities are significant in themselves, but given that African Americans are only 19% of the student population, these data show as well that African Americans are 5.3 times more likely to be suspended for fighting than other students. . . . [T]he District must investigate seriously whether discriminatory standards are being applied, and develop a plan to resolve disproportionate suspensions. 'Fighting' and infractions with discretionary definitions such as 'anti-social behavior' and 'disruptive behavior' should be monitored carefully.[41]

d. Minority staff recruitment

The consent decree required the San Francisco district to "implement a staffing policy" with the goal of "achiev[ing] a staff at each school site and district location that will reflect the student population of the district . . . ." [42] Likewise, the proposed Minnesota rules require all "segregated" districts to develop "affirmative action plans and staff assignment" and "staffing practices to retain, recruit, and prepare educators and staff of color."[43] (Under the rules, schools that fail to meet their goals could technically be penalized, even to the point of losing state aid.[44])

Despite its drafters' intentions, the San Francisco consent decree failed to increase significantly the

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[37]Ibid., 62.
[38]Ibid., 68.
[39]Ibid.
[40]Ibid., 69.
[41]Ibid., 70.
[42]Ibid., 71.
[43]Roundtable Discussion Group Final Report, Appendix D. 8.
[44]The 1994 proposed rules state that, "If a district fails . . . to meet the goals of [its] Desegregation/Integration Plan. . . . [c]ontinued noncompliance shall result in action pursuant to Minn. Stat. sec. 124.15."

number of minority staff in the district's schools. The Orfield report stated that, since 1984, the district "has made only minimal progress in faculty desegregation and has fallen far short of the goals set forth in . . . the decree."[45] When the decree was implemented in 1982, 66 percent of the certified teaching staff were white; in 1990-'91, the figure was 62.4 percent. The greatest increase from 1982 to 1991 took place among Hispanic faculty, which grew from 5.9 percent to 7.3 percent of total faculty.[46]

The Orfield report expressed dismay that, "The proportion of white staff remains about four times the proportion of white students and the modest gains among minority staff are primarily among Hispanics and Chinese."[47] However, its authors acknowledged that, "Although the District has not achieved the staffing goal, the proportion of minority professionals probably exceeds that of the relevant labor market. The limited number of minorities in the relevant labor market . . . obviously makes it difficult for the District to achieve the Consent Decree goals . . . ."[48]

The report recommended a renewed effort to add minority faculty. "The faculty desegregation goals of the Decree are vital to the success of the plan," it declared. "We call for a new recruiting plan for African American and other underrepresented groups of teachers, greater efforts to train paraprofessionals to become teachers, and faculty desegregation at the building level."[49]

e. Staff development

From the beginning, the San Francisco consent decree placed great emphasis on "staff development" in schools targeted for desegregation. Consent decree planners' hopes for closing the racial gap on special education and discipline rates rested largely on staff training. In 1994, the Minnesota Legislature took a similar approach, appropriating funds for staff training and development in connection with "school desegregation/integration and inclusive education policies." But the failure of such training to accomplish its goals in San Francisco raises questions about the usefulness of programs planned here.

The consent decree required the San Francisco district to develop a "comprehensive staff development plan" with activities focused on "areas identified as essential for staff in school districts undergoing desegregation," including "student discipline procedures and goals," "academic achievement and performance goals," "teaching in a diverse racial/ethnic environment" and "parental involvement."[50] In addition, the plan was to permit the faculty "to work out better educational approaches and to improve faculty attitudes towards minority students."[51]

The consent decree provided significant funds for these purposes.[52] According to the report, the staff development effort began with "good initial plans"[53]:

> In 1983, the District's Division of Staff Development, Curriculum, and Program

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[45]"Desegregation and Educational Change," 71.
[46]Ibid.
[47]Ibid.
[48]Ibid., 72.
[49]Ibid., 8.
[50]Ibid., 57; 17.
[51]Ibid., 7.
[52]Ibid., 7. According to the report, "The Consent Decree provided for ongoing training and a 1989 stipulation raised the maximum provision for training from $300,000 to $3,000,000. The District's actual expenditures on training since then, however, have ranged from $395,000 to over $2.5 million." Ibid., 57.
[53]Ibid., 58.

> Evaluation prepared a detailed plan for improving the skills of administrators, teachers and instructional aides. This plan, . . . outlined a delivery system for reaching the District's entire staff. Staff members who met the criteria were to participate in training throughout the school year. The most time-consuming, intensive training was intended for the staffs working in those schools targeted by the Consent Decree.[54]

Costs were significant. The report noted that:

> The budget provided for employing teachers for more days and hours to make time available for serious training and proposed spreading new techniques by using successful teachers to train others. Funds were also provided to prepare demonstration video tapes, to hire substitutes to cover classes in order to allow some teachers to become involved in the planning of staff development, for outside consultants, and for the purchase or printing of special training materials and reports.[55]

Yet despite eight years of training of this kind, San Francisco's racial/ethnic gap in special education and discipline rates persisted. Apparently, the Orfield Committee took this as evidence that training had been insufficient. Ten years after training began, the Committee declared, "We believe that the effort has fallen short and must be substantially strengthened if schools . . . are to meet their goals."[56]

The report's authors voiced concern "both about the effectiveness of programs and about some funds that have been used for some miscellaneous programs not related to central Consent Decree objectives."[57] In part, the report blamed a lack of funds for the ineffectiveness of staff development. While acknowledging that state funding for consent decree training had grown over the years, the report noted that the district's own budget for staff development had fallen. This, said the report, had "severely limited the ability of the District to carry out the Consent Decree mandates dealing with such concerns as student discipline and behavior, academic achievement and performance, teaching in a diverse racial/ethnic environment, and parental involvement and support."[58]

f. Orfield's recommendations

The San Francisco consent decree began in 1982 as a "pathbreaking" plan that "broke fundamentally with the traditional pattern of big city desegregation in the U.S."[59] Ten years after its implementation, however, the Orfield report painted a bleak picture of the plan's results.

Yet the report did highlight two consent decree provisions which it claimed had produced real academic benefits. According to the report, both minority students who transferred to "clearly superior schools" and those who attended reconstituted schools had improved academically.

The report claimed that "There were clear benefits for students who transferred into competitive

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[54]Ibid.
[55]Ibid.
[56]Ibid., 7.
[57]Ibid., 57.
[58]Ibid., 59.
[59]Ibid., 12-13.

middle class schools in the District."[60] Though the situation of "low-income black students across the District" was "grim,"[61] the report found the record "more encouraging for those transferring to one of the District's 12 elementary schools with the highest average achievement level . . . ." These students, it noted, were almost two-thirds more likely to be in the same school and to be at grade level in math by third grade."[62]

Yet the sample of transfer students to such schools was small. "Unfortunately, there were only 54 Bayview-Hunter's Point students in the three years studied who enrolled in the twelve most competitive schools, much less than two students per year." [63] Claims about the academic improvement of students who made such transfers are dubious for another reason. As the report itself acknowledged, "There probably was some self-selection among the families who sent children substantial distances to schools with almost no students from their home neighborhood."[64] Dr. Christine Rossell, a desegregation expert who rebutted Orfield's testimony, confirmed the "very strong possibility" of a self-selection bias.[65]

Even if transfers to middle class schools produced gains for minority children, few transfer students had the good fortune to find themselves in such schools. The Orfield report acknowledges that, "The definition of desegregation and desegregative transfers built into the Consent Decree did not produce large numbers of educationally beneficial transfers. . . . Most

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[60]Ibid., 38.

[61]Ibid., 42.

[62]Ibid., 41.

[63]Ibid. The report notes that, "This was not because of overt enrollment barriers, since Bayview-Hunter's Point students had priority in transfer choices. It may have been due to lack of information, available space, or discouragement by District staff." Ibid.

[64]Ibid., 38. Gary Orfield has cited the academic gains of San Francisco minority students who transferred to middle class schools as one of the plan's few real successes. See Debra O'Connor, "Metropolitan Desegregation Plan Seeks to Bridge the 'Learning Gap'," *Pioneer Press*, April 10, 1994. ("'The kids who transferred to middle-class schools had bigger gains than even those who attended reconstituted schools,' Orfield said.")

Yet when he was cross-examined on this subject in *Sheff v. O'Neill*, the Connecticut case, in 1993, Orfield was unable to provide data that supported the claim. Cross-examination of Gary Orfield at 106-110, *Sheff v. O'Neill*, No. CV-89 360977 S (Super. Ct. Conn.) (decision pending). In response to defense counsel's questions about differences in background between transfers and non-transfers, Orfield acknowledged that the only document he had produced "would not be an accurate picture" of the data on which he had relied. Ibid., 129. The attorney performing Orfield's direct exam stated that, "[T]he document that's been offered into evidence has no bearing on the San Francisco report, and wasn't even used as a basis for the witness' testimony or the report." Ibid., 130. The judge agreed with defense counsel that the document contained "regressions that were done in connection with the San Francisco report that *disprove* . . . the conclusion [Orfield] drew (emphasis added)." Ibid. 133.

[65]Direct examination of Christine Rossell at 51-56, *Sheff v. O'Neill*, No. CV-89 360977 S (Super Ct. Conn.) (decision pending). Rossell testified that academic performance of black transfer students at the top 12 schools could not be due to "integration," since "the percent white in the schools . . . is 8 percent," a fact that could not be determined from Orfield's published data. She challenged Orfield's statement that a "classic integration effect" exists: "There is no classic integration effect. There's a whole lot of controversy on the effects of integration, so I'm not too sure what classic integration effect he's talking about." Ibid., 53-54. Rossell observed that, "You have to ask yourself, 'What kinds of children would leave their home school to go to . . . academically the top twelve schools. . . . ? What kinds of children would put themselves in that kind of a competitive atmosphere voluntarily?'" Ibid. Rossell pointed out that the table on which Orfield based his claims about academic benefits of transfer included data on only 37 students.

Regarding the San Francisco plan generally, she commented, "[I]t's an 80 percent minority school system, which has had a mandatory reassignment plan since 1971, that drove out most of the whites. And that consent decree continued what I consider to be this Byzantine bean counting, where you've got virtually no whites left in the school system, and people are going around trying to figure out how to parcel out the few whites so that every school is 5 percent white. And I keep thinking to myself, 'What a waste of resources: money that could go into education or reducing class size or getting better teachers.'" Ibid., 180.

transfers [from the largely black Bayview-Hunter's Point area] were to . . . schools where students were often less successful than those who remained behind."[66] As a *Wall Street Journal* article put it, "For many black and Latino families, the consent decree has meant that their children are bused across town to schools that are often poorer in quality than their neighborhood schools."[67]

After eight years of race-based busing, the report recommended that "African American students enrolled in consistently weak schools should be allowed to return to local schools or transfer elsewhere, in compliance with desegregation requirements."[68] Unfortunately, however, a number of the city schools that black and Hispanic children would most like to attend are "capped out" for children of their racial/ethnic group.[69] Unwilling to give up racial quotas, the Orfield report recommended considering metropolitan magnet schools and implementing a city-suburb transfer program.[70]

g. Reconstitution

The Orfield report claimed that minority students who attended reconstituted schools had experienced "strong academic benefits."[71] Reconstitution was carried out in a small number of schools in Bayview-Hunter's Point, a poor black area. "The tools provided" to these schools, the report noted, "were extraordinary,"[72] and "very substantial resources were made available."[73] Reconstitution involved "selecting a new principal and recruiting an entire new staff at a school, committed to the goals of the Consent Decree."[74] The teachers' union contract was "simply suspended" and new principals were given freedom to recruit nationwide.[75] Teachers already in the system could apply for positions at reconstituted schools, but they had to compete for the positions.[76] The decree's "affirmative action policy required special efforts to hire a staff more reflective of the diversity of the District's student enrollment."[77]

In fact, whether reconstitution really produced significant academic benefits is open to question. The report does not provide much data to back up its assertion. According to it, subsequent expansions of the decree to "four more sets of schools . . . without any comprehensive educational plans produced no significant overall gains."[78]

Yet even if reconstitution produced gains, the process is very difficult to carry out. Clearly, measures like suspending collective bargaining agreements, hiring top-notch new principals and recruiting nationwide for new staff can only be employed at a few schools in a district.

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[66]Ibid., 47.
[67]Lawrence J. Siskind, "San Francisco's Separate and Unequal Public Schools," *Wall Street Journal*, July 13, 1994.
[68]Ibid., 6. The report called for "ending long-term mandatory transfers to schools with very low achievement levels." Ibid.
[69]"San Francisco's Separate and Unequal Public Schools."
[70]Ibid., 6.
[71]Ibid.
[72]Ibid., 33.
[73]Ibid.
[74]Ibid., 5.
[75]Citing *Little Rock School District v. Pulaski*, an Eighth Circuit case, the report asserted that a consent decree approved by a court to protect constitutional rights takes precedence over collective bargaining agreements. Ibid., 75.
[76]Ibid., 33.
[77]Ibid., 3.
[78]Ibid. 32.

h. Additional recommendations

The Orfield report concluded that "The Committee's work shows that the District must do more than it has done to educate Hispanic and African American children."[79] Not surprisingly, the report urged that the consent decree's failure be remedied by even more coercive and race-conscious measures. The report called for "annually reconstituting at least three schools until the task is complete."[80] It also recommended more "multicultural sensitivity and race relations training" for staff,[81] along with "a new recruiting plan for African American and other underrepresented groups of teachers . . . and faculty desegregation at the building level."[82] The report observed that "Desegregation of staff would be considered achieved when the racial and ethnic characteristics of all school staffs within the system are within plus or minus 10 percentage points of the racial and ethnic characteristics of the District's teachers and other staff . . . for the four major ethnic groups."[83] If goals could not be met by hiring new teachers and voluntary reassigning those already in the system, the report suggested that teachers be mandatorily reassigned.[84]

Likewise, the report called for new racial quotas for suspensions and special education assignments within each school building. It urged the San Francisco district to, "Examine strategies to cut a school's suspensions if suspensions exceed the proportion of students from that ethnic group in the enrollment by more than 5%."[85] Likewise, it recommended that, "The percentage of special education students in any one school should not exceed the percentage of special education students in the District by more than 15 percentage points."[86] The report suggested "requir[ing] every school whose percentage of African American or Hispanic students assigned to special education exceeds by more than 15 percentage points the percentage of African-American or Hispanic students in the system or in the school's non-special education population to file an annual report with the Superintendent detailing precisely what actions are being taken to determine the inappropriate placement of students assigned to special education."[87]

Paradoxically, while the Orfield report called for increasingly coercive quota-based, race-conscious remedies, it insisted that its "improved plan for the Consent Decree will not subtract from some groups to pull others up."[88] Unfortunately, however, San Francisco's high-achieving Chinese-American students -- the district's largest ethnic group -- have already paid a price for the consent decree's well-intentioned efforts to achieve "equity." Under the decree, Chinese-Americans' low dropout rates and high achievement scores pose a problem for district officials, since Chinese students qualify in disproportionate numbers for high-demand schools. In response, administrators have altered standardized entrance exams to increase Asian students' difficulty in qualifying, for example, for popular Lowell High School.[89]

Far from promoting racial/ethnic harmony, the San Francisco plan has significantly escalated racial

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[79]Ibid., 6.
[80]Ibid., 56.
[81]Ibid., 60.
[82]Ibid., 8.
[83]Ibid., 73.
[84]Ibid.
[85]Ibid., 70.
[86]Ibid., 64.
[87]Ibid., 65.
[88]Ibid., 9.
[89]"San Francisco's Separate and Unequal Public Schools."

tensions. Not surprisingly, the consent decree has spawned new litigation: Chinese-American parents have filed a suit challenging the decree because their children are shut out of some of the city's best schools. The decree has also encouraged dishonesty and cynicism. The Orfield report decried the fact that many families are misrepresenting their race or ethnicity "to obtain special consideration for a school or program assignment," and school officials are encouraging them to do so.[90]

After the devastating failure of San Francisco's "pathbreaking" plan, it is amazing that the Minnesota SBE has proposed a "desegregation"/learning gap plan that resembles it. It is also surprising that the Desegregation Roundtable relied on Orfield -- who played an important role in formulating the failed plan -- without retaining a second expert, who could point out the perils of the San Francisco approach. Minnesotans must insist that the SBE familiarize itself with the San Francisco debacle. They must hold the Board accountable if it adopts rules that start our state down the road San Francisco has traveled.

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[90]*Desegregation and Educational Change*, 24.

CHAPTER VI
The Learning Gap Rule's Racial Requirements and Their Consequences

(1) The requirements

The Roundtable's 1994 proposed rule requiring schools to close the "learning gap" resembles the San Francisco desegregation plan in a significant respect. It imposes *de facto* racial quotas on Minnesota schools with more than 30 minority students, extending these to four broad measures that encompass most aspects of school life.[1]

Pressure to "balance" racial numbers certainly exists in other states. Because of plaintiff groups' recent attempts to interpret racial differentials in test scores and discipline rates as "vestiges" of former illegal segregation, some districts with court-ordered desegregation plans are attempting to equalize racial statistics on a growing variety of measures. But it is most unusual for a judge to *require* that this be done, even in the context of a court order. It is equally unusual for an obligation of this sort to be imposed by state law. In fact, a rule obligating schools to achieve racial parity in achievement scores, dropout rates, rates of suspension and expulsion, and remedial and honors class participation, would probably be unique in the country.

In her article, "The Drive for Racially Inclusive Schools," Abigail Thernstrom comments on the rarity of such requirements. She describes *Larry P. v. Riles*,[2] a 1979 federal court case that banned the use of IQ tests for black children in California schools. In *Riles*, plaintiffs had asked that racial quotas be applied to remedial education classes, but the judge rejected those arguments. Thernstrom mentions one other example of a requirement of this kind: "In 1971 a California legislative declaration prohibited disproportionately high numbers of students who were members of any racial or ethnic group in EMR [educable mentally retarded] classes, but the legislation had no teeth. These California demands and declaration are unique, to the best of my knowledge."[3]

Many educators believe that this sort of pressure for racial "balance," though well-intentioned, is both misguided and counterproductive. There is "a lot of knee-jerk, Band-Aid response, especially when it comes to minority achievement," a Montgomery County, Maryland administrator has said. "We are under pressure to have the right numbers: not too many black kids suspended, get more in honors courses." But, "[i]t's all about looking good and not dealing with the real problems."[4]

If the Roundtable's learning gap rule seeks to bring about material changes in minority students' lives -- if it seeks to improve behavior, for example, and not just decrease the number of suspensions -- it is unlikely to achieve its objective. It will, however, lead to a number of unintended consequences. If adopted, it will create a perverse series of incentives and disincentives that will force schools to walk a tightrope. By encouraging teachers and administrators to juggle racial numbers to "balance the books," it will reward them for doing things that are not in the best interests of the children under their care.

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[1]As noted earlier, the learning gap portion of the 1995 proposed rules has not yet been finalized. The February 13, 1995 rules state that all districts must submit "Community Learning Plans" that address the learning gap." Revised Recommendations from the Roundtable Discussion Group," 7.

[2]495 F. Supp. 926, 957 (N.D. Cal. 1979).

[3]"The Drive for Racially Inclusive Schools," 134.

[4]Ibid., 142.

a. The racial gap in academic performance

Two things must be remembered in assessing the likely consequences of enforcing the 1994 learning gap rule. Penalties for noncompliance are severe. Schools that fail to reduce the gap in a way that satisfies the Commissioner of Education will be reconstituted after four years. Subsequent noncompliance can lead to complete loss of autonomy, and a takeover by the SBE. Yet despite the severity of these penalties, the rule is very vague about how compliance will be measured. It states only that "results and progress are to be determined by the use of multiple, non-discriminatory measures." [5]

One other point is significant. The rule is framed in terms of reducing or eliminating a gap between white and minority students. Thus, it does not require an absolute rise in minority scores or honors class participation, or an absolute drop in minority discipline rates or remedial class participation in order to achieve compliance. Instead, it assesses progress strictly in terms of racial comparisons. Theoretically, then, schools can comply with the rule by *lowering* white test scores or *increasing* white suspensions, so long as the result is a narrowing of the racial gap.

Though not framed in explicitly racial terms, the 1995 proposed rule poses the same problem. The rule calls for improvement of all students' scores, but simultaneously commits the State to reduce the learning gap: "The State Board of Education recognizes that a successful Desegregation/Integration policy must insure the following: (1) The learning of all students will be improved; (2) The learning gap between learners living in high concentrations of poverty, who are predominantly persons of color, and their peers will be reduced . . . ."[6]

In such an environment -- and given the severe penalties that threaten them -- many school administrators are likely to act pragmatically. They will compare incentives and disincentives,

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[5]Roundtable Discussion Group Final Report, Appendix D, 3. The 1995 proposed rules, although not complete as to the learning gap, are more specific. They state that, "The component [sic] of the plan for closing the learning gap must include at least the following: A. Current achievement levels of students district-wide at least in the areas of reading and mathematics; B. District criteria which identify the learners to be served by compensatory learning revenues: (1) Low achievement levels (2) Attendance Information (3) Drop out rates (4) Compensatory interventions (5) Suspension and expulsion information (6) Self-perception inventory; C. Measurable results which the district expects to achieve with learners being served by compensatory revenue program(s), over a two-year period of time . . . ; D. Measurement procedures to determine progress toward achieving results . . . ; F. Identify instructional methods and/or strategies to be implemented to address the learning needs of all students; G. Strategies for professional development training of district staff to address the diverse learning needs of all students; H. Identify the local, state, and federal educational resources that will improve the achievement of all learners and that reflect the diversity of educational needs. . . . "Revised Recommendations from the Roundtable Discussion Group," 8.

[6]"Revised Recommendations from the Roundtable Discussion Group," 2. As noted earlier, this shift to framing the gap in socioeconomic, rather than racial, terms could be critically important to plaintiffs in winning a lawsuit against the State of Minnesota. Significantly, the rule does not indicate how "high concentrations of poverty" are to be defined.

It is interesting to speculate about how a shift in the definition of the learning gap from explicitly racial to socioeconomic terms might affect Asian-American students. Under both the 1994 and 1995 rules, these students are defined, along with black, Native American and Hispanic children, as "learners of color." In Minneapolis, however, Asian children score far above black children. For example, in 1993-'94, Asian sixth graders scored at 42 in reading vocabulary, 57 in reading comprehension, 68 in math computation and 72 in math concepts. Black sixth graders scored at 23 in reading vocabulary, 31 in reading comprehension, 33 in math computation and 33 in math concepts. If Asian students do not generally live in "high concentrations of poverty," why does it make sense to continue to define them as "learners of color" under the 1995 rules? Yet if they are removed from this category, it will become even harder for Minneapolis to "close the gap," since Asian students' high scores will be removed from the "learners of color" pool.

More generally, the SBE should address the question of whether the shift to a socioeconomic definition of the learning gap will force removal of middle-class black, Hispanic, Indian and Asian children from the category of "learners of color." The implication seems odd: You're really black, Hispanic, Indian or Asian only if you're poor.

assess countervailing pressures, and do what they have to do to keep their staffs in place, and their schools under local control.

What, specifically, are administrators likely to do if ordered to reduce the achievement gap? Since schools know little about how reliably to raise black achievement, administrators will find it much easier to comply with the rule by lowering white achievement -- a far less expensive venture as well. In fact, the achievement gap has been narrowing in recent years because, though black achievement has risen, white achievement has remained essentially stagnant on almost every measure.[7] Paradoxically, in both its 1994 and 1995 forms, the learning gap rule creates a *disincentive* for teachers to encourage white achievement gains. After all, if both white and minority achievement rise, the gap will remain at its current level, and theoretically, schools could find themselves out of compliance.

Teachers could, of course, attempt to create the illusion of a rise in minority achievement by "teaching to the test" or coaching on test content. In fact, when Armor analyzed rising minority scores following desegregation in Norfolk, Virginia, he discovered that this probably was the explanation.[8] Most would argue, however, that teaching to the test does not serve children well. Such an approach is completely inconsistent with current pedagogical trends that stress flexible, "creative" classroom instruction.

In sum, the learning gap rule creates strong incentives to "dumb down" white achievement, or to engineer sham advances by minority students. Countervailing pressures exist, of course. The parents of gifted white and minority students may well perceive what is happening and object, and school administrators will find that "numbers juggling" grates strongly against their professional standards. But given the severe penalties that noncompliance evokes, such developments are surely not beyond the realm of possibility.

b. Honors/remedial

The 1994 learning gap rule creates equally perverse incentives where honors and remedial class participation is concerned. Given NAEP data on black and white gaps in math and science, it is difficult to imagine that black students will be proportionately represented in honors calculus or physics classes in the near future. The gap in reading and writing is such that disproportions must be expected in honors classes in those subjects as well.

The proposed rule creates a strong incentive on the part of school administrators to alter honors classes in a way that will prevent them from becoming a source of trouble. A logical school administrator has four potential courses of action if racial quotas are imposed on such classes. He or she may drop honors classes, dumb them down, teach different material to students in the same class, or create "false" honors classes (for example, with a multicultural theme) to bring racial numbers into balance.

Faced with these choices, many administrators' primary objective will no longer be to provide excellent classroom instruction. It will be to avoid the rule's penalties, and to head off potential charges of racism or elitism. Countervailing pressures will be weaker and more remote. These will include the protests of parents of both white and minority gifted students, and administrators'

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[7]"Student Achievement and the Changing American Family," 106.

[8]Armor notes that in 1979 Norfolk began an intensive basic skills program called "Competency Challenge." It appeared to have a positive effect on both black and white achievement in 1979 and 1980, but an internal study indicated that some teachers were improperly teaching test content or coaching on the test. The problem seemed confirmed in 1981 when a new form of the test was given and average scores declined significantly for both black and white students. *Forced Justice*, "The Harm and Benefit Thesis," ch. 3.

professional reluctance to behave hypocritically or take steps whose effect on students is so obviously detrimental.

The situation is similar with regard to remedial classes. Currently, as a group, minority children receive more special help than white children do. This is not surprising, as the dire family and socioeconomic situations of many minority students produce greater problems than their white counterparts generally face. For this reason, the State pays schools substantially more, per capita, to educate poor children. Apparently, the Roundtable did not see the contradiction in claiming that schools need more money to cope with poor minority children's extraordinary problems, while simultaneously insisting that these children participate in remedial and honors classes in numbers equivalent to middle-class whites.

Unfortunately, the proposed rule is likely to make it harder for some minority children to get the special help they need. Because the rule views minority children as "overrepresented" in remedial classes, it creates an incentive for schools to keep them out. As a result, the rule may prompt increased litigation against school districts by minority parents who suspect that their children are being deprived of needed services strictly because of their race. A recent case involving the Edina schools may illustrate the shape of things to come. In that situation, a mother filed a claim with the Minnesota Department of Human Rights, charging that her child had been "denied access to [a] special education program on the basis of her race."[9] The Department found in the mother's favor.

Just as the new rule creates incentives to remove minority children from remedial classes, it rewards administrators for placing them in gifted and talented programs for which they may not be prepared. Litigation is likely to increase in this context as well, as another recent case suggests. In December 1994, the mother of a black and American Indian St. Paul boy sued the St. Paul district because her son, who tested as deficient in reading and writing skills, had been placed in a gifted and talented program.[10] While the facts in this and the Edina case may not perfectly parallel those likely to arise under a learning gap rule, they suggest that the new rule creates incentives which may have unintended consequences.[11]

Some educators claim that black children without special education problems are shunted into remedial classes simply because teachers can't cope with their disruptive behavior. This may not be the way to deal with such children. But if racial quotas lead to placing more disruptive children in regular classrooms, what will be the effect on black and white students trying to learn there? Will the new rule actually make racial parity more difficult to attain by producing chaotic classrooms, where both white and minority children find it difficult to learn? On the other hand, the new rule may create a perverse incentive to place more minority children *in* remedial classes, for children in some remedial classes may not figure into calculations of the learning gap.[12]

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[9]Jeffrey Pieters, "MDE Affirms June Decision," *Sun-Current* (Edina), 9 November 1994.

[10]Kevin Duchschere, "St. Paul District Ordered to Devise Plan for Learning-Disabled Teen," *Star Tribune*, January 10, 1994.

[11]Undoubtedly, there will be pressure on teachers to place minority children in gifted programs or honors classes for which some may not be ready. In his recommendations for improving the San Francisco consent decree plan, for example, Gary Orfield urges "staff development" that promotes "methods of encouraging placement [of minorities] in gifted and advanced classes." *Desegregation and Educational Change in San Francisco*, 60. In recent years, the Ann Arbor, Michigan schools have attempted to reduce distinctions between regular classes and honors classes, partly with racial balance in mind. However, in some classes, "tracking" still occurs, as some children contract to do "intensive" work and some do not. Problems have arisen particularly with reorganized math classes. Conversation with Nancy Shifler, Ann Arbor Public Schools, February 24, 1995. The Ann Arbor experiment has led to significant dissatisfaction on the part of many teachers and parents. For a general discussion of the pressures to reduce "tracking" and adopt "cooperative learning" to achieve "equity," see "The Drive for Racially Inclusive Schools," 138-40.

[12]When it transmitted the 1994 proposed rules to the Legislature, the SBE included a motion, passed on February 8,

Obviously, the new rule creates a tightrope on which many schools will find it difficult to balance.

c. Dropouts

Currently, dropout rates in Twin Cities schools are higher for black, Hispanic and American Indian students than for whites.[13] Little is known about how reliably to bring dropout rates down.

Special schools for potential dropouts may help solve the problem. But generally, keeping kids in school when they do not want to be there adds to a school's problems. This is especially true when the school is legally required to bring racial achievement and discipline rates into parity. Students who have no interest in studying may lower their racial group's achievement scores, making it more difficult to close the learning gap. Similarly, they are more likely to have disciplinary problems which, if handled fairly, will probably lead to higher rates of suspension and expulsion.

Should litigation following enactment of the Roundtable rules eventually result in mandatory metro-wide busing, minorities' dropout rates may well rise. Long bus rides, of the kind that will be required if Shakopee and Waconia find themselves with racial quotas, often result in higher dropout rates. Consequently, if the Roundtable's proposed racial quotas are enacted, suburban schools will find themselves in a bind. If they are to meet their 10 percent quotas (or even if they are simply required to "eliminate segregation to the greatest extent possible"), they may have to import a large number of minority transfers from urban schools. But the farther suburban schools are located from these students' homes, the more likely such students will be to drop out. High dropouts rates are a problem even in strictly voluntary busing programs. As noted earlier, half of the black students who chose Hartford's Project Concern -- a completely voluntary program -- left before completing the program.[14]

d. Discipline rates

Discipline problems are increasing in many Minnesota schools. In Minneapolis and St. Paul, black students are suspended or expelled in proportionately far greater numbers than white or Asian-American students. Racist attitudes by teachers and administrators are sometimes cited as a primary cause of this disparity.[15] As a result, some principals already feel pressure to minimize disciplinary measures against black students.

Double standards on discipline are likely to proliferate if the SBE enacts a rule resembling its proposed 1994 learning gap rule. Though "racially balanced" schools are often said to promote interracial harmony, double standards will create conditions in which race relations are sure to fester.

A bill introduced by Sen. Ted Mondale during the 1994 legislative session illustrates how double standards may be institutionalized.[16] The Mondale bill *assumed* that suburban schools would treat

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1994, which recommended that, "enrollment of learners in certain remedial classes (e.g., LEP, migrant programs, etc.) would not be included as one of the factors in determining whether the district is closing the learning gap. . . ."

[13]Debra O'Connor, "Metropolitan Desegregation Plan Seeks to Bridge the 'Learning Gap,'" *Pioneer Press*, April 10, 1994.

[14]Many of the Project Concern students did not leave school, but simply returned to the Hartford schools.

[15]Wayne Washington, "Disparity Evident in Suspensions of Black Students," *Star Tribune*, May 17, 1994. In his San Francisco report, Gary Orfield clearly implied that black students' far higher suspension rates, particularly for "fighting," appeared to have a racist origin. *Desegregation and Educational Change in San Francisco*, 70.

[16]S.F. 2646 (1994).

minority transfer students unjustly, and therefore provided such students with special rights.

The bill called for creation of an organization called the Voluntary Inter-district Coordinating Council (VICC) to oversee the metro-wide desegregation process. VICC would have included representatives from each of the metro school districts, as well as the NAACP, the American Indian Affairs Council, the Asian-Pacific Minnesotans Council, the Black Minnesotans Council, and the Spanish-Speaking Council. Among other things, VICC would have established special disciplinary procedures for minority students who transferred to suburban school districts. In effect, the Mondale bill would have removed many disciplinary matters from local administrators' control, and reassigned them to a special group operating under VICC's auspices.

Specifically, the bill would have established a "recruitment and counseling center" to "provide information and counseling to transfer students and their parents concerning the treatment the transfer students receive." The center would have made available "assistance and counseling, consistent with applicable procedures in the receiving school district, to resolve transfer students' grievances or disputes that do not involve a suspension of more than ten days or an expulsion."

The bill assigned VICC responsibility for "mediating" any "grievance or dispute" that the counseling center proved unable to "resolve." Upon request, VICC was to appoint a mediating panel to conduct "non-binding arbitration." The bill provided that, "Each party to the dispute shall select a mediator from among VICC members and the two mediators shall select a third mediator." "If a grievance or dispute remains unresolved," it concluded, "the parties to the dispute may pursue other available legal remedies."

Cumbersome, expensive and legalistic disciplinary proceedings have contributed to the decline in order and safety that afflicts Minnesota schools. VICC would have exacerbated this problem by *politicizing* disciplinary proceedings. VICC's "mediation panels" would likely have been heavily influenced by activist groups, some of whose members seem to see "embedded racism" as the primary cause of student misbehavior.[17] VICC's elaborate structure would have provided the opportunity to turn even a routine disciplinary proceeding into a public forum on racism.

VICC would have further politicized disciplinary matters by pitting students of different groups against one another. The special VICC process was intended only for minority transfer students, not for resident minority or white students. Yet whenever one group is given special rights and privileges, other groups are likely to clamor for similar "protections." Double standards lead to resentment and cynicism about the judicial process, rather than a harmonious multicultural climate.

Perhaps most troubling, the Mondale bill's provisions would have encouraged minority transfer students to adopt a reflexive "victim mentality." By characterizing students' behavior-related problems as "grievances" against (presumably racially motivated) suburban school personnel, it would have implied that classroom racism, rather than personal effort, is the fundamental determinant of success or failure. Perhaps the intention here was good: To shield students who start life with disadvantages from the consequences of their own destructive behavior. Yet no attempt to dismiss the need for personal responsibility can change the fact that students who view themselves as victims of "society" -- rather than as individuals who can control their own actions -- are seriously handicapped in their quest for purposeful and productive lives.

While the Mondale bill did not become law last year, its provisions may soon be resurrected. Last session the Legislature established "an office of desegregation/integration" in the Department of

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[17]When racism is not blamed directly for racial differentials, the "cultural gap" between teachers and students often takes the rap. A comment in a 1994 *Star Tribune* article typified this view, observing that "teachers have to know that -- because of the growing diversity of the student population -- old ways of handling behavior have to change." Wayne Washington, "Disparity Evident in Suspensions of Black Students," *Star Tribune*, May 17, 1994.

Education to "coordinate and support activities related to student enrollment, student and staff recruitment and retention, transportation, and interdistrict cooperation among metropolitan school districts." This office is charged with "develop[ing] a process for resolving students' disputes and grievances about student transfers under a desegregation/integration plan."[18] Unless executive or legislative oversight ensures otherwise, the process this new office develops may resemble the one set forth in the Mondale bill.

Currently, the SBE is under pressure from some quarters to adopt a truly voluntary metro-wide "desegregation" plan. Such a plan would attempt to increase "racial balance" by relying on incentives to encourage suburban-district participation, rather than making participation mandatory. A voluntary plan would be unlikely to succeed, however, if the SBE simultaneously enacts a learning gap rule that requires districts to achieve parity on measures like discipline rates among racial groups in their schools.

If such a learning gap rule passes, suburban districts will simply be creating problems for themselves by encouraging minority transfers. If suburban administrators are faced with racial quotas on discipline matters, many will be reluctant to encourage transfer by inner-city students, some of whom will come from schools like North High in Minneapolis, where 41 percent of the student body was suspended last year.[19] Suburban districts are likely to be even less interested in voluntary participation if the Office of Desegregation/Integration sets up a "dispute resolution" process like the one formulated in the Mondale bill. For suburban districts, such a process will create a risk of becoming involved in expensive, high-profile proceedings that could lead to public charges of racial bias.

(2) Perception of fairness -- possibility of abuse and favoritism

The new rule gives the Commissioner great and open-ended power over the fate of Minnesota schools. The Commissioner determines which schools are making satisfactory progress in closing the learning gap, and which schools are not. This determination can result in the reconstitution of an entire school faculty, or even (under the 1994 rules) the loss of local control over a school's operation.

It is surprising, given the Commissioner's great power and the serious, long-term consequences attendant on it, that the rules do not contain detailed criteria to be used in making these determinations. Yet there are no standards that describe the sort of progress toward closing the gap that will "make the grade," and the sort that will not. The rule calls merely for use of "multiple, non-discriminatory" assessment processes, and states that progress toward achieving goals must be "satisfactory" in the Commissioner's estimation."[20]

This lack of criteria for measuring acceptable performance is problematic for two reasons. First, most Minnesota schools will be out of compliance on some measures; they may be improving on certain measures with certain racial groups, but failing to close the gap on other measures with other groups. How should a school expect to be assessed, for example, if black students' reading is improving, but the Hmong or Hispanic dropout rate is rising? Or if the school's physics classes or French club are failing to attract Hispanic students although the black suspension rate is down? Without clear standards, school personnel will find it difficult to set priorities or use resources

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[18] 1994 Minn. Laws Chap. 647, Art. 8, Sec. 2.

[19] "Disparity Evident in Suspensions of Black Students."

[20] Roundtable Discussion Group Final Report, Appendix D, 3,16. The 1995 rule, though not yet complete, seems likely to be somewhat more specific regarding measurement of gap reduction, but no more specific regarding the sort of "progress" that will "satisfy" the Commissioner.

efficiently in their efforts to close the gap.[21]

Second, a rule that gives the Commissioner such open-ended authority will fail in its purpose -- and will be greatly resented by both school officials and parents -- unless it is applied fairly and objectively. Many schools are unlikely to achieve, or even approach, racial parity on a number of measures. The Commissioner cannot possibly order reconstitution or assume control of all the schools that fail in this way. In the absence of specific criteria, the Commissioner's decisions may appear to be unduly influenced by political considerations. It seems possible that schools whose administrations defer to the MDE might be seen as making "acceptable" progress, while those that question the agency's approach might be seen as making "unacceptable" progress. Lack of objective criteria for such determinations is likely to produce a morale-depleting perception of discrimination and favoritism.

(3) Will penalties help close the gap?

Reconstitution and school takeover are likely to be costly, both in terms of tax dollars and school morale. Takeover, in particular, has profound anti-democratic ramifications. It would remove a school from the control of representatives elected by the families and taxpayers it serves, and place it under the control of a distant state agency, the SBE. The 1994 proposed rule gives schools seven years to "achieve the goals . . . for closing the gap." After that point, "the State Board will assume the responsibility of the education of the children at the site and develop a plan for equitable educational outcomes of those students."[22]

It is odd that the SBE should see takeover as a hopeful remedy, after all previous efforts to close the gap have failed. Since the SBE meets only once a month and has a small staff, the Minnesota Department of Education would probably take *de facto* control of schools for which the SBE had assumed responsibility. Yet prior to takeover, the MDE would already have assisted the district for years. The MDE would have offered advice and direction from the moment the school's initial "learning gap" plan was submitted, and would have spent a full year prior to reconstitution giving technical help and revising the school's learning gap plan. If the MDE's best efforts had already failed, what justification could there be for removing control of the school from those closest to it, and placing responsibility for its operation in the hands of distant state officials?

In fact, in the few instances nationally where state agencies have assumed control of local schools, there is little evidence that students' performance has improved. For example, the New Jersey Department of Education took over the 29,000-student Jersey City school system in 1990. Each year thereafter, the state spent $75 million in a broad-based effort to improve student performance. But standardized test scores have declined steadily. In 1993-'94, scores for high school juniors in reading, writing, science and math were significantly below pre-takeover levels. A majority of students drop out of school, and last year only 20 percent of seniors passed the High School Proficiency Exam, a basic test required for a diploma. Since the takeover, student violence has increased 111 percent.[23]

The Jersey City takeover occurred because most students in the district had performed at substandard levels for years, and many system officials were perceived as corrupt. However,

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[21]Schools will develop their learning gap plan in concert with the MDE, and should receive some guidance during this process. But without objective standards, they will find it difficult to predict the consequences of failing to achieve some (or all) of their plan's goals.

[22]Roundtable Discussion Group Final Report, Appendix D, 16. Thus far, the 1995 rule does not contain a takeover provision.

[23]Conversation with Dan Cassidy, Educational Policy Aide to the Mayor, Jersey City, New Jersey, February 5, 1995.

under the 1994 proposed Minnesota rule, takeover could technically occur in schools where a majority of students were doing fine. Paradoxically, takeover could pose the greatest threat to administrators of integrity who preferred to struggle honestly with stubborn problems rather than juggle numbers to "look good."

Like takeover, reconstitution seems to offer little hope as an effective remedy for poor minority performance.[24] Nationally, only San Francisco appears to have experimented with reconstitution as a tactic for improving minority performance. It is startling that the SBE would attempt to write reconstitution into law in Minnesota on the basis of the limited and disappointing trial the measure received there. Moreover, in San Francisco, reconstitution was tried in only a few schools that were truly failing. The SBE's proposed rule, however, would require the Commissioner to reconstitute -- not a few "failing" schools -- but *any* school, no matter how successful otherwise, that failed to reduce the racial gap to the Commissioner's satisfaction.

(4) Additional questions raised by reconstitution

Reconstitution raises troubling questions beyond its effectiveness in improving minority performance. These include both logistical questions, and questions of fairness to teachers and students.

Reconstitution poses daunting logistical challenges.[25] Where will administrators of reconstituted schools look for the uniquely talented new teachers they will be seeking to hire? Will they search among the faculties of other schools, either in their district or elsewhere? (Gary Orfield stressed the importance of a nationwide search for such teachers)[26] Many teachers will not want to work in the potentially chaotic environment of a newly reconstituted school. If teachers identified as good candidates choose not to leave their current positions, will there be an attempt to force them to do so? The 1995 proposed rules require that reconstitution be carried out in disregard of collective bargaining agreements.[27] Will this policy -- and the litigation that could follow -- promote the harmonious new environment that reconstitution seeks to foster? On the other hand, if school districts "buy out" the contracts of teachers they wish to leave, will this be a good use of state funds?

What criteria will administrators use to identify teachers who are likely to be more effective with minority children than the teachers recently dismissed? If some teachers have a track record of success with minority children, is it right to deprive the minority students at one school of such teachers so that students at the reconstituted school can benefit from their skills? If teachers play such an important role in minority success, might not other schools find their racial gaps widening once "good" teachers are siphoned off for reconstituted schools?

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[24]The 1994 proposed rule defines a "reconstituted school site" as "a school site whose staff is reassigned to other schools within the district because the learners of that site have not made adequate progress toward reducing the gaps for learners of color . . . ." The rule states that, if a school site is not in compliance after four years, "the commissioner *shall* direct that the site be reconstituted." Roundtable Discussion Group Final Report, Appendix D, 16. The 1995 proposed rule defines a "reconstituted school site" as "a school site whose staff is dissolved because the learners of that site have not made adequate progress toward reducing the gaps for learners of color. . . ." The rule states that, if a school site is not in compliance after four years, "the commissioner may direct the local board of education to reconstitute the school site." Revised Recommendations from the Roundtable Discussion Group, 17.

[25]Apparently, implementing reconstitution might require amendment of a number of Minnesota laws currently on the books.

[26]*Desegregation and Educational Change in San Francisco*, 33.

[27]The rules state that, "The local board of education shall have the authority to reconstitute a school site irrespective of bargaining agreements." Revised Recommendations from the Roundtable Discussion Group, 17.

Will administrators assume that replacement teachers should, if possible, be minority members themselves? There does not seem to be good evidence that minority children actually learn more from teachers of their own race.[28] Clearly, if reconstitution is seen to require an increase in minority personnel, the process will be difficult to accomplish, for the limited number of minority teachers is already in great demand.[29]

Will the search for teachers for reconstituted schools inherently favor younger over older teachers? Orfield's San Francisco report exhibited a troubling tendency to speak disparagingly of older teachers, and seemed at points to imply that reconstituted faculties should be composed of younger people.[30]

The 1994 proposed rule states that, when a school is reconstituted, its teachers are to be reassigned to other schools in the district. Will they displace teachers currently teaching at those schools? If so, where will those teachers go? Natural attrition will open some spaces, but an attempt to disperse "reconstituted" teachers throughout a school district would be likely to pose serious logistical problems.

The assumption underlying reconstitution seems to be that some teachers do well with minority students, while others do better with white students.[31] Does this imply that teachers who fail with minorities are racist, as the St. Paul Blue Ribbon Commission report suggests? If so, why should teachers who leave a reconstituted school be allowed to teach at *all?* On the other hand, if some are competent, and are merely asked to leave because the rule requires a complete turnover, why should they be punished for the failure of their colleagues?[32]

Reconstitution promises to be hard on teachers. But it may also bring hardships to students, both minority and white. A growing number of schools try to provide the stability missing at home by assigning students to "teams" or small classes, which may be taught by the same teacher for several years. The Minneapolis school board recently announced that stability is now the number one priority for children in their district. Reconstitution, however, could require replacement of a school's entire staff, including at least some teachers and counselors children have come to know and trust. A new staff would need several years to establish a genuine sense of community.

Under the new rules, many otherwise successful schools could find themselves facing reconstitution because some minority children there are not making progress "satisfactory" to the Commissioner. But what about children -- both white and minority -- who are doing well? Reconstitution could actually arrest their progress if new teachers adopt teaching styles or remedial

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[28]"The Drive for Racially Inclusive Schools," 141; see Gerald David Jaynes and Robin M. Williams, Jr., eds., *A Common Destiny: Blacks and American Society* (Washington, DC: National Academy Press, 1989), 364.

[29]Bob Hotakainen, "Incentives Urged to Attract Minority Teachers to State," *Star Tribune*, August 14, 1991.

[30]For example, the report stated that, "[without reconstitution], school leaders could only try to use staff training funds to turn around a school which might be staffed with older teachers working in a negative setting" (35); "San Francisco must provide stronger instruction for a rapidly changing student body but must rely primarily on an aging, largely white, teaching force whose formal education ended many years ago. . . ." (58); "For a district with an aging teaching staff and few recent hires, this was an opportunity to hire gifted outsiders." (33).

[31]Orfield has made various vague claims about the reasons for reconstitution's alleged success. The process, he has said, is based on a philosophy that emphasizes "high achievement, better instruction, positive attitudes and good race relations." *Desegregation and Educational Change in San Francisco*, 35;33. Yet many social scientists would consider this an "atheoretical" approach, fleshed out with few specifics and based on hopes and generalizations, rather than coherent social science theory.

[32]Apparently, some education officials interpret reconstitution as merely giving school districts the right to move out teachers perceived as poor performers. However, the 1994 proposed rule is stated in mandatory and sweeping terms, and implies that a school's entire staff must be reassigned. The 1995 proposed rule seems to permit retention of favored teachers, for it speaks in terms of "dissolving" the faculty.

measures designed for children who are failing. Parents of children who are "held back" in this way may well object to reconstitution and its effects.

Parents are also likely to object to the decline in quality and efficiency that hasty measures to effect reconstitution may entail. The 1994 proposed rule states that if the SBE upholds the Commissioner's decision to reconstitute a school, "the school site must be reconstituted by the beginning of the next school year." The attempt to replace a school's entire staff in a few months is likely to lead to chaos, not quality.

Reconstitution could clearly create more problems than it solves. It will be particularly destructive if it prompts school administrators to juggle racial statistics by taking actions that are injurious to the children in their care. It is also likely to be very costly. Neither the SBE nor the Roundtable seems to have calculated the costs of dispersing a school's entire staff throughout a district, while identifying, hiring and training replacements for each departing staff member, especially where this is done in defiance of collective bargaining agreements and requires national searches.

CHAPTER VII
Costs and Conclusion

If advocates and critics of the SBE's proposed rules agree on one thing, it is this: Metro-wide desegregation, and new learning gap requirements, will be expensive.

Though funding proposals varied, in 1994 the Minnesota Department of Education proposed a plan costing between $17 million and $32 million the first year, and between $15 million and $38 million each subsequent year.[1] These figures assumed that school districts, and not the State, would pick up a large part of the plan's cost, since districts would pay for transportation of transfer students as well as new space needs.[2] The Department dropped its request for between $25 million and $49 million when Governor Carlson indicated that he would veto such legislation because of its expense.[3]

After giving the SBE the go-ahead to enact broad metro-wide desegregation and learning gap requirements, the Legislature took limited initial steps to facilitate a metro-wide plan. It approved $20 million in bonding authority for the creation of two magnet schools, one to be located in Minneapolis and one between St. Paul and Roseville.[4] In addition, it allotted $1.5 million in grants for magnet school start-up costs, and set aside $150,000 to create an Office of Desegregation/Integration in the Department of Education. The bill also created and funded an advisory board to assist the Office of Desegregation/Integration with its duties. The board will be composed of eight school superintendents, as well as a representative of each of the following organizations: the Indian Affairs Council, Asian-Pacific Minnesotans, the Council on Black Minnesotans, and the Spanish Speaking Affairs Council.[5]

Under pressure from suburban districts, the 1994 legislation required that the State of Minnesota, rather than suburban districts receiving minority transfer students, pick up the extra costs associated with those students. It directed the Commissioner of Education to "recommend to the legislature by February 1, 1995, a policy for ensuring the school districts participating in a metropolitan-wide school desegregation/integration plan are not financially disadvantaged as a result of participating in the plan." [6]

(1) Unknown costs

Desegregation sums being bandied about are already sizable. But what new desegregation rules may eventually cost Minnesota is unknown.

The SBE's proposed rules will entail direct costs, as well as indirect costs more difficult to calculate. Direct costs will include the costs of magnet schools, the sums required to compensate suburban districts for participation in "desegregation" efforts, increased AFDC caps and "double" payment to schools, and transportation costs for transfer students. Indirect costs will include the cost of inefficiencies resulting from implementation of the rules, the cost of enforcing the learning gap rule and its penalties, litigation costs, and the cost of future measures likely to be enacted when the failure of current provisions becomes apparent.

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[1]Debra O'Connor, "Desegregation Proposal Could Cost $32 Million," *Pioneer Press*, February 8, 1994.
[2]Debra O'Connor, "Schools Give Nod to Integration Plan But Clutch Wallets," *Pioneer Press*, March 9, 1994.
[3]Debra O'Connor, "Education Bill Would Launch Desegregation," *Pioneer Press*, May 7, 1994.
[4]Debra O'Connor, "Magnet Schools Are First Step in Metro Desegregation," *Pioneer Press*, May 30, 1994.
[5]1994 Minn. Laws Chap. 647, Art. 8, Sec. 2.
[6]1994 Minn. Laws Chap. 647, Art. 8, Sec. 37.

No matter what form the SBE's final rules take, magnet schools are likely to play a large part. Magnet school education is expensive. According to Armor, magnet schools generally cost 10 percent to 20 percent more per student than regular schools, not counting capital expenditures.[7] In 1994, the Legislature allotted $20 million for creation of just two of these schools, and the Roseville district, where one is to be located, is already insisting it needs more money.[8] Yet if white children are to be attracted to central cities in substantial numbers, as the proposed rules require, many more magnet schools will have to be established. Kansas City's experience demonstrates that Minnesota could spend hundreds of millions on costly magnet schools, yet fail to attract more than 1,000 suburban students.

The cost of compensating suburban schools to educate minority transfers is likely to be a large part of the expense of metro-wide desegregation in the Twin Cities, as it is in St. Louis and Milwaukee, where somewhat similar voluntary plans are in place. Administrators in suburban schools have been up front about the financial incentives they will require to cooperate. Though about 30 superintendents have endorsed the metro-wide plan, few wish to pay for it, pleading overcrowding in their own schools. They want money to cover per-student costs for transfers, including debt service. They also want money to explain and sell the program to district residents, and insist that all transportation, including activity buses, be paid for by the state.[9]

Another significant portion of the 1994 desegregation funding request -- between $9 million and $22 million -- was devoted to boosting state aid to school districts that educate poor children. As the *Pioneer Press* explained it, "Now, a child from a welfare household gets 65 percent more than the standard state allowance; under the metropolitan desegregation proposal, such a child would receive up to double the standard amount. The money follows the children to whatever school they attend."[10]

In St. Louis and Milwaukee, a form of "double payment" to the home districts of transfer students adds a sizable chunk to the metro desegregation bill. The full per-pupil allotment follows students to their new district, but their home district continues to receive a portion of the funding they would have received if the child had remained there. Under the St. Louis plan, a student's home district continues to receive half the transfer student's per-pupil allotment.[11] In Milwaukee, both the home and transfer district are permitted to include transfer students for purposes of state aid calculations.[12] Somewhat similar funding arrangements have been proposed for a metro-wide plan in the Twin Cities, and promise to be very expensive. The ways in which metro desegregation would add to student transportation costs have already been discussed.

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[7]Conversation with David Armor, February 2, 1995. Armor is currently co-principal investigator of a national study of magnet schools sponsored by the U.S. Department of Education.

[8]Linda Owen, "Districts to Pick Magnet School Site," *Pioneer Press*, June 3, 1994.

[9]Debra O'Connor, "Schools Give Nod to Integration Plan But Clutch Wallets," *Pioneer Press*, March 9, 1994.

[10]Debra O'Connor, "Desegregation Proposal Could Cost $32 Million," Pioneer Press, February 8, 1994.

[11]While St. Louis continues to receive half the state aid for a transfer student, the suburban school gets full state aid plus a "tuition incentive," which is also paid for by the State. The tuition incentive is calculated according to a formula adopted as part of the consent decree. The formula takes the total district expenditure per child and subtracts various kinds of state and federal aid the district receives. The amount remaining is the sum supplied by local tax revenues. Since transfer students do not reside in the district and contribute to local revenues, the state assumes this portion of the cost of educating them. Conversation with Tim Sweeney, Desegregation Services Department, Missouri Department of Elementary and Secondary Education, February 7, 1995.

[12]Under Milwaukee's Chapter 220 program, for each transfer student a district accepts, the district receives the average per-pupil cost of education from the state. In addition, if suburban districts accept 5 percentage points more city students than they are obligated to accept under the consent decree, they receive "bonus aid" for each such student. Both a student's home district and his or her transfer district continue to count that student in calculations for state aid. Conversation with Betty Nicholas, Director, Chapter 220 Program, Milwaukee, Wisconsin, February 8, 1995.

Beyond these direct costs, as noted, there likely will be many indirect costs as well. For example, the new rules may well lead to significant inefficiencies in the use of educational resources. Given residential patterns, such inefficiencies are inevitable when city/suburb racial balance takes precedence over cost-effective use of resources such as classroom space and teacher time. Inefficiencies will be compounded if new construction and remodeling are approved only if they maximize metro-wide racial balance.

The costs of attempting to close the racial performance gap represent a truly bottomless pit. As discussed, Gary Orfield found that minority academic performance did not improve in four school districts that poured money into remedial efforts, or in Kansas City, with its enormously expensive magnet school program. The costs of attempting to eliminate racial gaps in dropout rates and rates of suspension and expulsion are impossible to calculate. Likewise, no one knows how many schools will meet the criteria for reconstitution (or takeover), or what enforcement of these penalties will cost taxpayers.

The cost of litigation connected with the rules has already been discussed. But the cost of disputes with teachers' unions must also be considered.

Like the 15-percent rule, the SBE's proposed desegregation and learning gap rules will probably fail to achieve many of their objectives. Down the road, then, we should expect calls for even more funding to remedy the perceived causes of their failure.

In the past, advocates of the harm-benefit thesis generally pinned their hopes on goals like "racial balance," which can be defined in precise statistical terms. Experience has shown, however, that racial balance by itself does not reliably improve either minority achievement or race relations. Today, supporters of metro-wide busing tend to frame their objectives in much more difficult and elusive terms. They speak in terms of outcomes, or states of mind, that no school can ensure and no expenditure of money can guarantee.

The League of Women Voters, a strong supporter of metro-wide busing, now insists that desegregation -- so long the goal -- may in fact be "a new way to practice racism and unequal education."[13] Instead, the League seeks "integration," which it conceives of in vague and seemingly utopian terms: "Integration is the *realization* of educational opportunity. There are many fewer integrated than desegregated schools. . . . To be successful in achieving civil rights, harmony and brotherhood, other ingredients are essential to desegregated schools that are also integrated. . . . Ideally desegregation develops into integration, which is a social situation marked by mutual respect and equal dignity in an atmosphere of acceptance and encouragement of distinctive cultural patterns."[14]

The SBE's proposed desegregation rules take up this theme. The 1994 rules define "integration" as "the result of eliminating barriers in bringing about equal educational outcomes for diverse groups of learners." The 1995 rules add that, "Integration is affective interactions between diverse groups of people where common trust, respect, and honor are acknowledged by all."

As terms like "desegregation" and "integration" lose their original meaning, calls for programs that seek to manipulate student and staff attitudes -- as well as racial proportions -- are likely to increase. Thus, the League of Women Voters' report recommends "racial sensitivity training" for all metro-area school staff, and suggests that changing teachers' attitudes is essential to reducing

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[13]Council of Metropolitan Area Leagues of Women Voters, 30.
[14]Ibid.

minority discipline rates.[15] Likewise, the report suggests that white students receive attitudinal training modeled on an earlier program for Minneapolis and suburban tenth-graders that collapsed for lack of funding. In this program, the report observes, "A well-planned curriculum was developed to help the students identify their prejudices of race, age and sex while interacting with each other and a wide variety of trained facilitators representing various groups. Then the students were to be sensitized to the effects of their prejudices and how to begin to deal with them in a more constructive fashion."[16]

The League report recommends additional measures to achieve "integration," such as setting aside "a fixed number of seats for each ethnic group [on] all student-governing committees."[17] To monitor compliance, it proposes funding a new desegregation office for each school superintendent. The costs of measures like these is uncertain, but the likelihood of their promoting resentment, rather than racial harmony, is not.

Equally speculative is the cost of the financial incentives necessary to get students to participate in metro-wide "desegregation" efforts. At the January 1995 meeting of the SBE's Desegregation/Integration Committee, a member raised the possibility of a program, modeled on the GI Bill of Rights, that would award college funds to any student who made an integrative school choice.[18] The costs of such a program could be substantial.

(2) Conclusion

Given such a lengthy critique of a plan meant to assure educational fairness and success for all Minnesota children, there is a certain felt obligation to suggest (in equal detail) what might work better. But beyond the fact that I suspect few readers are eager to take on another hundred pages or so, the larger consideration -- as this monograph I hope has demonstrated -- is that there is no clear public policy route for adequately improving the educational performance of minority children. If there were such a course, it would certainly have been found and vigorously pursued by now, both here and elsewhere across the nation. In lieu, let me just offer a few ideas.

First, neighborhood schools must be an option for the parents of poor minority children. A friend has reported that he knows a Minneapolis single mother whose four young children each attend different schools, all a good distance from their home. If some or all of her children attended neighborhood schools, this mother would find it much easier to become involved with their education. Neighborhood schools can provide stability, keep families together, and contribute to a sense of community too often missing in the lives of poor urban children. Mayor Sharon Sayles Belton is to be saluted for her wisdom and courage in endorsing a neighborhood school approach.

Second, we in Minnesota should take full advantage of the innovative educational environment we enjoy here. We should take UCLA's Harold Gerard's advice and create many small educational laboratories in which we can do "R & D" on what works best for poor minority kids. We should

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[15]The report quoted approvingly from the MDE's 1988 *Report of the Curriculum Task Force on the Black Learner*: "If the approach taken [by teachers] is one of understanding differences in acceptable behavior rather than one of total adjustment of minority children to the majority expectations, then minority suspensions are likely to be reduced." Ibid., 30-32.

[16]Ibid., 15.

[17]Ibid., 32.

[18]This idea was suggested in 1988 by Merton Johnson, Bloomington School Board chair. Merton proposed that for each full year of participation in a desegregation program, an eligible student would earn $750 toward post-high school tuition in an approved post-secondary school program. If a student participated for 12 years, the incentive could be as much as $9,000 upon graduation from high school. Johnson proposed that the state fund the program, and fund (or subsidize) the inter-district transportation necessary to implement it. Ibid., 26.

think, even more concertedly, in terms of charter schools, as well as well-conceived magnet schools that focus on subjects in which many families have an interest.

We should be scouring the nation for programs that look promising. Schools like the California Academy of Mathematics and Science in Carson, California deserve attention. The Academy -- whose students are 86 percent minority -- is a joint venture of the California State University System, eight school districts in the Los Angeles area, and a consortium of high-tech companies.

According to an article in the *New York Times*, the Academy is a "bold experiment that offers promising minority students a demanding math and science curriculum, access to the resources of a university and lots of remedial attention. The early results have been extraordinary."[19] The Academy uses school-based management and scope-and-sequence curricula, where subjects like algebra, geometry and trigonometry are integrated, rather than taught in isolation, one grade at a time. There is a dormitory for students unable to live at home, and mentors who take students to the theater or workplace. The school has a full-time fundraiser.

Of course, relatively few children can or will attend schools like the California Academy, and promising experiments have a way of disappointing. What we *can* give all poor urban children in Minnesota -- at very little cost -- is the chance to attend, not only the public school, but the private school of their choice. Schools like Xavier Prep in New Orleans and St. Agnes in St. Paul hold out real hope for families seeking a wholesome and academically rigorous environment for their children.

My American Experiment colleague Chester E. Finn, Jr., who served as an assistant secretary of education during the Reagan Administration, wrote several years ago:

> It's something close to a public policy sin to allow wealthy people to select the public or private school they prefer while keeping poor people trapped in schools where they are able to afford to live, especially since those are often the least successful schools in the land.
>
> And it's just plain crazy in a society that permits people a wide choice of what to eat, what to wear, where to live, what doctor to use, what church to worship in, what newspaper to read, what day care program to send their toddlers to, what college to send their 18 year olds to -- it's crazy not to permit those same people to decide what elementary or secondary school they'll send their children to.[20]

Of course, private-school choice is no panacea. At base, real school choice -- universal choice -- is about freedom. But over and above, if many more parents had the option of sending their children to the school of their choice, wouldn't that lessen fears about many children -- particularly black and other minority children -- being cheated by the current system?

Third and finally, in all we do, we must uphold high standards and expectations. We must focus on the content of the curriculum our children are taught, and ensure that it is rich, information-laden, and well-grounded in basic skills. Currently, too many children are not mastering the fundamentals of reading, writing and math -- without which all talk about "higher-order thinking skills" and *real* self-esteem is in vain. Time studies document that American children spend a depressingly small part of the school day on serious academic work. In this respect, we should look closely at E.D. Hirsch's experiments in urban environments with his "Core Knowledge

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[19]Jane Gross, "In School: A School Mixing Math, Science and Minority Students Has Impressive Early Results," *New York Times*, August 3, 1994.

[20]Chester E. Finn, Jr., "Is There a Role for Private and Parochial Schools in the Education Revolution?" paper delivered to the Minnesota Federation of Citizens for Educational Freedom, Bloomington, MN, November 9, 1991.

Curriculum."

Nothing is certain when it comes to ways in which to boost the academic achievement of poor minority children. Unfortunately, the socioeconomic factors which underlie the learning gap are beyond the schools' control. But surely, if anyone in this nation can create a laboratory to search for partial answers, we in Minnesota can.